NOTE

This Microfiche meets the quality requirements of the American National Standard for Microfiche of Documents (ANSI PH5.9-1975). However, because of imperfections in the document from which it was made, it contains images that are illegible or difficult to read. The source document for this microfiche is the best copy that could be obtained prior to filming.

CIS Congressional Information Service
Washington, D.C.

S. HRG. 101-90

COMANCHE PEAK AND RANCHO SECO NUCLEAR POWERPLANTS

HEARING

BEFORE THE

SUBCOMMITTEE ON NUCLEAR REGULATION

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

THE SECRET SETTLEMENT AGREEMENTS RESTRICTING TESTIMONY AT COMANCHE PEAK NUCLEAR POWERPLANT AND ECONOMIC INCENTIVES AFFECTING THE OPERATION OF RANCHO SECO NUCLEAR POWERPLANT

MAY 4, 1989

Printed for the use of the
Committee on Environment and Public Works

U.S. GOVERNMENT PRINTING OFFICE

98-980 WASHINGTON : 1989

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S321-20

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

QUENTIN N. BURDICK, North Dakota, *Chairman*

DANIEL PATRICK MOYNIHAN, New York
GEORGE J. MITCHELL, Maine
MAX BAUCUS, Montana
FRANK R. LAUTENBERG, New Jersey
JOHN B. BREAUX, Louisiana
HARRY REID, Nevada
BOB GRAHAM, Florida
JOSEPH I. LIEBERMAN, Connecticut

JOHN H. CHAFEE, Rhode Island
ALAN K. SIMPSON, Wyoming
STEVE SYMMS, Idaho
DAVE DURENBERGER, Minnesota
JOHN W. WARNER, Virginia
JAMES M. JEFFORDS, Vermont
GORDON J. HUMPHREY, New Hampshire

DAVID M. STRAUSS, *Staff Director*
ROBERT F. HURLEY, *Minority Staff Director*

SUBCOMMITTEE ON NUCLEAR REGULATION

JOHN B. BREAUX, Louisiana, *Chairman*

DANIEL PATRICK MOYNIHAN, New York
HARRY REID, Nevada

ALAN K. SIMPSON, Wyoming
STEVE SYMMS, Idaho

CONTENTS

OPENING STATEMENTS

	Page
Breaux, Hon. John, U.S. Senator from the State of Louisiana	1
Simpson, Hon. Alan K., U.S. Senator from the State of Wyoming	17
Symms, Hon. Steve, U.S. Senator from the State of Idaho	5
Reid, Hon. Harry, U.S. Senator from the State of Nevada	18

WITNESSES

Austin, T. Louis, Jr., president, Brown & Root	59
Letter to employees	61
Written statement	130
Garde, Billie Pirner	69
Mactal, Joseph J	52
Written statement	126
Pate, Zack, president, Institute of Nuclear Power Operations	5
Letter to Sacramento Municipal Utility District Board of Directors	9
Shetler, James, assistant general manager, Rancho Seco Nuclear Generating Station	23
Smeloff, Edward, member, board of directors, Sacramento Municipal Utility District	20
Written statement	98
Spence, Michael D., president, Texas Utilities Generating Co	85
Letter to the committee	95
Written statement	139
Zech, Hon. Lando W., Jr., Chairman, Nuclear Regulatory Commission	28
Letter to all licensees	32
Memo from the General Counsel, NRC	35
Written statement	108
Additional statement submitted for the record:	
Ellis, Juanita, president, Citizens Association for Sound Energy [CASE]	159

COMANCHE PEAK AND RANCHO SECO NUCLEAR POWERPLANTS

THURSDAY, MAY 4, 1989

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON NUCLEAR REGULATION,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:33 a.m., in room 406, Dirksen Senate Office Building, Hon. John Breaux (chairman of the subcommittee) presiding.

Present: Senators Breaux, Simpson, and Reid.

OPENING STATEMENT OF HON. JOHN BREAUX, U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator BREAUX. The subcommittee will please come to order. We'll be joined shortly by the Ranking Republican Member of the Subcommittee, Senator Alan Simpson, who is delayed for a few minutes. He'll be with us shortly.

We have a very full agenda for the hearing today, and what we will do as a means of outlining the procedure, will be that we will be first taking the witnesses for the Rancho Seco issue that is before the committee. We'll be hearing from the witnesses dealing with the Rancho Seco issue. We will then hear from the Nuclear Regulatory Commission members, and that will be followed by witnesses for the Comanche Peak Nuclear Powerplant, the issues associated with the committee's concern in that area.

The NRC, when they appear, will be asked to address both of the issues dealing with Rancho Seco, and then they will be asked to deal with the issues surrounding the Comanche Peak Powerplant. And our final panel will be the witnesses for the Comanche Peak Powerplant.

I would point out, for the benefit of everyone who is here, that it is the intent of the subcommittee to go until 12:00 noon. If we are not finished at 12:00 noon, the subcommittee will have to recess because of previous commitments, and we will return at 1:30, if we need to do so.

The focus of part of our hearing this morning deals with the Comanche Peak issues which are based on secret monetary settlement agreements that restrict the ability of plant workers to testify before the NRC's licensing boards, or even before the Commission itself. We've asked the persons involved in these agreements to provide their opinion as to whether these type of restrictions are legal or are permissible. We've also asked them to address the

question of whether the law needs to be changed to make it clear that such agreements are in fact not permissible.

It is shocking to me that we should even have to hold a hearing on such questions. It seems self-evident that it is wrong to pay witnesses not to testify, regardless of the context. Any judicial procedure becomes a sham if witnesses can be paid to withhold evidence. Yet, we find that in the area of nuclear regulation the practice may be common. Until last week it had even been accepted by the NRC. This is especially alarming since building, operating, and regulating nuclear powerplants demands a higher standard of trust and openness, not a lower one.

I am most surprised that the legality of these payments could even be an issue in light of the substantial body of law that says that agreements of this type are, in fact, illegal. First, basic contract law states that contracts for the suppression of testimony are void as against public policy. Second, section 210 of the Energy Reorganization Act prohibits any NRC licensee, or a contractor, or a subcontractor, from discriminating against any employee for testifying or in any manner assisting or participating in any procedure under the Energy Reorganization Act, or the Atomic Energy Act. Thus, testifying is a protected activity under both the statute and the NRC's regulations implementing that statute.

The Commission has recently affirmed this in an April 27 letter to all of its licensees. I would note the letter was sent after this subcommittee began our investigations. This letter stated that under section 210 it is illegal to place any restriction on an employee's, or former employee's, communications with the NRC.

Third, the Federal Witness Bribery Statute makes it a crime, punishable by up to 2 years in prison, to offer to a witness, or for a witness to accept anything of value for that witness to be absent from a procedure before a Federal agency. In addition, the Federal statutes dealing with obstruction of agency proceedings makes it a crime to corruptly interfere with agency procedures.

Yet, this subcommittee has obtained copies of secret agreements. In one case, a former employee was paid $35,000, agreeing to keep their agreement confidential, and to not voluntarily appear as a witness or a party in the Comanche Peak procedure. He also agreed, after the receipt of the $35,000, that if he was ever served with compulsory process, that is, subpoenas, to testify, that he would take all reasonable steps to resist such compulsory process, including notification of the person that he had signed the contract with so they may be helpful in helping him to resist from having to testify.

We have copies of other agreements, wherein a former employee was paid $30,000, and agreed to keep the agreement confidential. And that he further agreed to not voluntarily cooperate with, or testify, in any discrimination or wrongful discharge case under the Atomic Energy Act, or the Energy Reorganization Act, and further agreed to not voluntarily testify or otherwise participate in any licensing or safety proceedings, or investigation before the NRC.

Other proposed agreements that we have seen, and have copies of, purport to offer as much as $15,000 to a former employee to not voluntarily appear as a witness or a party in any judicial or admin-

istrative proceeding involving the company or any of their contractors.

We will want to know the Nuclear Regulatory Commission's views on how these statutes apply to its proceedings. We want to know whether the Commission believes various agreements entered into at Comanche Peak run afoul of any of these statutes or principles. We'll also want to know why it has taken so long for the NRC to figure any of this out.

The subcommittee originally undertook this investigation to determine the extent of the secret agreements at Comanche Peak, and to determine their impact upon the Comanche Peak licensing process. We therefore required, through subpoenas, that the parties potentially involved provide any agreements which restrict, in any manner, the providing of safety information to the NRC. From the documents that we have obtained through the subpoenas, it appears that we now know the scope of this practice at Comanche Peak. It appears that there are at least two of these agreements. We will want to confirm this and determine their impact upon the safety of the plant, and the integrity of the licensing process.

The Comanche Peak licensing process was also terminated through a novel arrangement between Texas Utilities and the Citizens Association for Sound Energy. Under this agreement Texas Utilities would contribute $4.5 million towards the Citizens Association for Sound Energy, or CASE's, expenses incurred by their participation in the licensing process. And CASE would obtain formal participation in the oversight of the construction and the operation of the Comanche Peak plant. In return, CASE would agree to move to dismiss the licensing hearings.

Because the Licensing Board examined this agreement, and we've had the same opportunity through publicly available documents, my concerns about this part of the agreement have been satisfied. However, I am still troubled by the linkage of this settlement and the dismissal of the licensing proceeding to the settling of approximately $5 million in unrelated worker claims against Texas Utilities and the promise of the payment of another $500,000 to unspecified others who may have contributed to the licensing process. The NRC did not examine any of these agreements. There have been allegations that the linkage by Texas Utilities of the $5.5 million settlement of worker claims to the dismissal of the licensing proceeding was an intentional encouragement to those opposing the plant to favor that dismissal.

Conversely, there have been allegations that the threat of testimony before the Licensing Board was used to encourage Texas Utilities to settle these claims for higher amounts and sooner than otherwise would be the case. Because the NRC did not examine these linkage issues, and because they affect the integrity of the regulatory process, the subcommittee is conducting such an examination.

Secrecy breeds distrust. Throughout the history of nuclear regulation, the Congress has insisted upon an open and public licensing process to promote trust and confidence. The public process we have today is a result of the belief that disclosure of all information will do more to advance public confidence in nuclear safety than suppression of selected information that the industry or the

Commission may believe is harmful, or irrelevant, and costly to dispute.

I support nuclear power. I also support an open and public regulatory process. These are not exclusive from one another. To the contrary, public support of nuclear power requires public discussion and trust. I would hope that the industry, the Commission, and the so-called public interest groups that are interested in nuclear power issues will learn this lesson. The Commission's tardy performance in this matter strengthens my resolve to abolish the Commission, and replace it with a single nuclear safety agency that will be headed by a single administrator.

This episode once again brings to the forefront the criticisms that have been leveled by the agency for a long time. The Commission structure is slow, it's inefficient, and it's unresponsive. And as a result, the Commission fails to send coherent and timely regulatory signals to the nuclear industry and the public, and this must be changed. The Senate, just last year, passed this committee's legislation by a vote of 89 to 6. And I expect to move quickly on this legislation again.

The subcommittee realizes that there is ongoing litigation involving many of the witnesses appearing before the committee today. I want to assure these witnesses that it is not our intent to affect any ongoing litigation, or to interfere with any due process, or fairness concerns of the parties involved. The focus of today's hearing is to be on the regulatory impact of these types of settlement agreements. Other forums will be more appropriate to sort out any questions of personal responsibility for their agreements. I would urge all of the witnesses to address their remarks to the issues of interest to the subcommittee as I have just outlined.

It is important to note, finally, that worker protection statutes, similar to section 210 of the Energy Reorganization Act, exist, in many other labor, and health and safety areas. The Toxic Substance Act, the Occupational Safety and Health Act, the Federal Mines Safety and Health Act, the Federal Railroad Safety Act, the Clean Air Act, the Clean Water Act, and the Superfund Law, among others, all have employee protection provisions. If employers are secretly avoiding the operation of these statutes in the same manner as what we are finding in the nuclear field, then we may truly have more dangers to workers and public safety than we are aware.

With regard to the issue at the Rancho Seco, the committee will be hearing from witnesses who are now invited to come up to the witness table to discuss the Rancho Seco issue. I think it is very important for the public to perceive the NRC as a faithful and aggressive watchdog. That is why I would like to see the NRC require that the Sacramento Municipal Utility District Board operate in more a collegial and consistent manner, and do more to encourage the acceptance of this type of economic incentive resolutions. I am concerned about the NRC's standing by while this resolution has been in place for so long. I do not think the public interest is adequately served by the mere reputation of the magic words, safety first. Words must be followed up by actions, and this has not occurred at the Rancho Seco Plant.

Senator Symms who is unable to be here today has asked that his statement be made part of the record. So, without objection, that will be done.

[The statement referred to follows:]

OPENING STATEMENT OF HON. STEVE SYMMS, U.S. SENATOR FROM THE STATE OF IDAHO

I strongly support nuclear power as a strategically important answer to our nation's energy security needs. Nuclear power will be an increasingly important component of our electricity-generating network. This is not only because of the uncertainty of our oil supplies, but also because of the clean nature of the technology and how vital that is to future environmental concerns. In fact, I believe nuclear power technology can be a savior for successful management of this planet's resources.

This is why safety is vitally important in the nuclear power industry. Safety for the public and for workers at all nuclear power plants is essential if we are to gain confidence of the American People to develop this technology for the future.

The Nuclear Regulatory Commission (NRC) is to be commended for an outstanding track record of enhancing commercial nuclear power safety. The NRC has issued new rules for standardization, fitness-for-duty, and emergency planning. Also, the Commission has recently issued a full-power operating license for the Shoreham nuclear plant. These are positive actions which should be applauded.

The nuclear power industry is also clearly committed to better safety. Management at most of the nation's nuclear plants continue to focus on and demand better safety. For example, 1988 performance indicators for the industry demonstrate that US commercial nuclear power plants are having fewer unplanned scrams, lower incidence of personnel radiation exposure, and are on-line more often. These are signs of ever-improving plant management across the country.

All of this good news has a hard time finding its way into the national media. I am sincerely concerned that today's hearing may only serve to damage the public's perception of nuclear power.

As I see it, we are trying to find out two things today.

First, we are trying to determine if the NRC has taken appropriate action and has played an appropriate role with respect to the operation of Rancho Seco Nuclear Generating Station. Certain political problems continue to interfere with proper management of the plant. This is clear to me from the alarming turnover rate of high-level management positions at this facility. The NRC should continue to watch this situation closely because it would be tragic if governance problems are allowed to jeopardize safety.

Second, we are concerned about the effect of settlement agreements reached for the Comanche Peak facility. Specifically, if individuals who are involved in Department of Labor settlement agreements do not appear as NRC witnesses, it's possible that safety concerns cannot be completely addressed by them. This seems fundamentally wrong to me. I understand that the NRC agrees with me and is directing the nuclear industry to find and nullify any existing settlement provisions which prohibit individuals from bringing safety concerns to the NRC. I believe this is an effective and appropriate response and I look forward to hearing more about this issue from the appropriate witnesses today.

Senator BREAUX. I want to ask Mr. Smeloff, Mr. Shetler, and Mr. Pate, who is already here, to please come up and we will begin our hearing this morning with testimony to be received, and would like to ask the witnesses to take their place at the witness table.

Mr. Pate, we welcome you to the committee, and look forward to your testimony.

STATEMENT OF ZACK PATE, PRESIDENT, INSTITUTE OF NUCLEAR POWER OPERATIONS

Mr. PATE. Good morning, Senator. I am Zack Pate, the president and chief executive officer of the Institute of Nuclear Power Operations, or INPO, in Atlanta, GA.

I've been asked to address issues surrounding the Institute's April 4, 1989 letter to the Sacramento Municipal Utility District

Board of Directors expressing concern over the governance of the District's nuclear program and the operation of its Rancho Seco Nuclear Generating Station. A copy of our April 4 letter is attached to my written testimony. (See p. 9.)

But first, for those of you who may not be familiar with INPO, it is a nonprofit, independent technical organization sponsored by the nuclear utility industry. Our mission is to promote the highest levels of safety and reliability—to promote excellence—in the operation of nuclear electric generating plants. Each of the 54 utilities in the United States with a nuclear program is a member of the Institute.

The key technical activities of the Institute can be divided into four cornerstone programs. First, we conduct evaluations of each operating nuclear electric plant in the country with emphasis on activities that can affect plant safety and reliability; second, the analysis of operating experience and the feedback of lessons learned to the industry; third, training and accreditation of training programs; and fourth, various forms of assistance, primarily aimed at sharing the best practices among the utilities. Our Institutional Plan and 1988 Annual Report provide additional details about the Institute's programs, and are attached to my written testimony. Also attached is a report, "Progress in the U.S. Nuclear Utility Industry 1979 to 1989," that further describes the Institute's activities.

Through these four cornerstone programs and our ongoing interactions with member utilities, the Institute develops insight into the operation of each nuclear power plant, as well as each utility's corporate support and governance of its nuclear program. In fact, we routinely evaluate a utility's corporate support of its nuclear units. Our experience has shown that solid, stable corporate support and governance are essential ingredients for the long-term success of a nuclear plant. A plant based on a less demanding technology, for example, one that manufacturers a simple product, may operate successfully for years without much corporate oversight or with unsupportive governance, but a nuclear plant does not.

INPO has had numerous interactions with the Sacramento Municipal Utility District and Rancho Seco for the past nine years, as we have with all members of the institute. The Rancho Seco station experienced a number of problems in the mid-1980s that led to an extended shutdown by the NRC from December 1985 to mid-1988. During this shutdown, INPO provided the utility with assistance as well as plant evaluations. We observed the upgrades to Rancho Seco systems, equipment and procedures and the retraining of personnel that took place during this time. Following the plant's return to service in mid-1988, INPO conducted a plant evaluation in the fall of 1988. In this evaluation we formally recognized the many improvements we had observed at the plant.

As you would expect, the NRC has closely monitored Rancho Seco for years. A Systematic Assessment of Licensee Performance, or a SALP report, for the period ending December 31, 1988, and recently issued by the Nuclear Regulatory Commission, reports an improving trend and overall favorable plant performance. As stated in our April 4 letter, the plant is staffed with generally well-

qualified, capable personnel. The physical plant is now in acceptable material condition.

However, the combination of other factors described in our April 4 letter to the SMUD Board are a cause for concern. After observing the station for years, and upon further review after events that occurred at the station on December 12, 1988 and January 31, 1989, we concluded that the history and pattern of actions by the SMUD Board of Directors is a major root cause of the long history of problems at the station. The Institute's overall concern, and the reason for our letter, is that the history of governance and the present governance situation, if unchanged, portend a continuing pattern of performance problems.

We were also asked to address the safety impact of the economic incentive resolution that was enacted for Rancho Seco in 1988. By way of background, in the early 1980s, the industry and INPO developed a set of overall performance indicators for monitoring and trending nuclear plant performance. A copy of the 1988 Performance Indicator Report is included in our Annual Report, which is, again, attached to my written testimony. INPO has been concerned for some time about the potential for misuse of some of these indicators.

Performance indicators, such as unplanned automatic scrams or forced outage rate, are best used as tools for management to monitor and trend plant performance. Too much attention on any one indicator, by management or by outsiders, has the potential to send the wrong signal to workers in the plant.

A few State economic regulators have established capacity factor requirements, and the impact of not meeting the minimum capacity factor is sometimes a financial penalty to the utility. While this kind of action by an economic regulator worries us, the situation with the Rancho Seco resolution, or Ordinance 88–1, is far more troublesome. In this case, failure to meet the capacity factor requirements in the resolution could mean permanent closure of the plant and loss of livelihood for plant personnel. Thus, such a resolution places an inordinate burden on an operating staff and has the potential to lead to non-conservative actions by plant personnel in an effort to keep the plant on the line, and in order to protect their livelihood.

In April 1988, in response to INPO's objection to the ordinance, the president of the SMUD Board caused a second resolution to be passed that was intended to clearly state that nuclear safety must always be placed ahead of economic considerations. At our urging, this second resolution was communicated to all Rancho Seco employees.

INPO's interactions normally are conducted directly and privately with its individual member utilities, and independent of the NRC. INPO has found through experience that public disclosure of a utility's shortfalls in performance, as measured by standards of excellence, makes it difficult for the utility to keep its sights on excellence. However, unlike most other INPO members, SMUD makes public all correspondence concerning its nuclear program.

Due to the nature of the problems described in our April 4, 1989 letter, and the knowledge that the letter would be made public immediately, a copy of the letter was provided directly to the NRC as

a courtesy. A copy of the transmittal letter to the NRC is attached to my written testimony. We advised the NRC that while INPO has serious concerns with the long-term governance of SMUD's nuclear program, at the present time plant personnel are especially cautious and conservative due to attention by the NRC and due to a strong focus on safety by the plant management team. We pointed out that, in our view, the concerns stated in our letter need to be addressed, not as an immediate crisis, but rather over the coming months to assure long-term improvements and consistent performance at the Rancho Seco Nuclear Generating Station.

The NRC took aggressive action after learning of our concerns to keep the Rancho Seco plant in shutdown status until further insight could be gained, and to promptly hold a meeting on April 7, 1989 with the SMUD Board and senior managers. I am sure that Chairman Zech will comment further on that meeting.

The principal question and concern we have now is whether the SMUD Board will carry out in practice the planned actions described to the Commission on April 7. With that in mind, we fully share the concerns of this committee, and we appreciate your interest in the matter.

Senator, subject to your questions, this concludes my testimony.

[The April 4 letter referred to by Mr. Pate follows:]

INPO

Institute of
Nuclear Power
Operations

Suite 1500
1100 Circle 75 Parkway
Atlanta, Georgia 30339-3064
Telephone 404 953-3600

April 4, 1989

TO: SACRAMENTO MUNICIPAL UTILITY DISTRICT BOARD OF DIRECTORS

Mr. J. Buonaiuto, President
Mr. D. Cox, Vice President
Mr. P. R. Keat
Mr. E. Smeloff
Mr. C. R. Wilcox

Dear Sirs:

The purpose of this letter is to express our concern over the governance of the nuclear program by the Board of Directors of the Sacramento Municipal Utility District (SMUD), and to urge appropriate changes. As the senior officials of the organization that holds a license to operate the Rancho Seco Nuclear Generating Station, the Board members have direct responsibility for the safe operation of the station. It is also the Board which has the major influence or control over the matters of concern to the Institute of Nuclear Power Operations.

Our concern is based on the following factors:

(1) The history of overall performance of the Rancho Seco nuclear station . . . . . See Attachment 1

(2) The pattern of troublesome operational events at the Rancho Seco nuclear station . . . . . See Attachment 2

(3) The excessive turnover in senior management positions that has occurred in recent years, and that appears to be continuing . . . . . See Attachment 3

(4) The difficulty the company has experienced and continues to experience in attracting and retaining nuclear management talent

(5) The pattern of actions/decisions by the board of directors, and by individual members of the board, that have led either directly or indirectly to the problems described in 1 - 4 above

Many upgrades have been achieved in the plant in the past few years. It is a potentially valuable resource to northern california and the national electric grid. However, the history of governance and the present governance situation, if unchanged, portend a continuing pattern of performance problems.

Amplification of each of our concerns is provided in the paragraphs that follow.

1. History of Overall Performance: . . . . . See Attachment 1

In the early 1980s, INPO worked with its member utilities, as well as with a number of experienced individuals from outside the utility industry, to develop a set of overall performance indicators for measuring and trending nuclear plant performance. Attachment 1 shows how Rancho Seco compares with other plants in the industry for eight of the ten overall indicators over the past five years. (Sufficient data is not available on Rancho Seco for two indicators.) As can be seen from a review of Attachment 1, Rancho Seco's performance is consistently in the lower quartiles. Although not shown on the graphs, Rancho Seco's performance in the aggregate is well below all other plants with a Babcock & Wilcox nuclear steam supply system.

After its August 1985 evaluation, INPO placed Rancho Seco in its lowest performance category.

During a protracted shutdown following the December 26, 1985 event, a wide range of improvements were made at the plant, and in the training of personnel. A capable management team was put together, and in 1987 and 1988 the board provided good support and a period of relative stability.

After careful scrutiny, the Nuclear Regulatory Commission gave permission for restart in March 1988, and the plant was brought on line and ran well for several months. However, the senior management team, including the Board, that provided the leadership to achieve this progress has now been largely dismantled, as will be discussed in the paragraphs that follow.

2. Pattern of Troublesome Events: . . . . . .See Attachment 2

A review of the attachment shows a pattern of recurring troublesome events at Rancho Seco, and that the frequency of such events is much higher than at other U.S. plants. The attachment also shows that two significant events have occurred in recent months.

3. Turnover in Senior Management: . . . . . See Attachment 3

In less than four years, the District has had:

- o 3 Board Presidents
- o 4 General Managers
- o 4 Senior Nuclear Executives
- o 5 Plant Managers

The general manager was removed in June 1988 and a replacement hired. The senior nuclear executive (CEO, Nuclear) who led the station's recovery effort and successful startup and ascension to power in 1987 and 1988 resigned in July 1988.

The individual who was president of the SMUD Board of Directors in 1987 and 1988 was a key factor in achieving a period of board stability and in providing support to the nuclear management team during the recovery and startup of the plant. Notwithstanding this, and the excessively high turnover in the other key positions, the board elected a new board member (who was elected to the board in December 1988 and who has no previous experience at SMUD) as its president in January 1989.

With this action, the board completed a chain that results in the turnover of all top positions (related to nuclear) in a 12-month period, and that includes a change in the top post at a critical time in the recovery of the District's nuclear program. The result is that the senior management team that directed very difficult phases of the recovery in 1987 and 1988 is no longer in place.

4. Difficulty in Recruiting and Retaining Personnel:

It has been difficult for SMUD to attract and retain nuclear personnel for some time, and the situation appears to be getting worse.

- o Total turnover of personnel in the nuclear program is now averaging 12 percent annually, as compared to an industrywide average of 4.9 percent.
- o Turnover of system engineers was 25 percent over the past year.
- o Several key managers at the Rancho Seco Nuclear Generating Station have resigned in recent months. A number of other key managers in the District's nuclear program are actively seeking employment elsewhere in the industry.
- o The personnel assigned to 25 of the top 30 positions at the Rancho Seco Nuclear Generating Station have changed positions within the past 12 months.
- o The District has been unable to attract a deputy for the CEO Nuclear, a position vacated when the present CEO Nuclear was promoted in July 1988.

5. The Pattern of Actions/Decisions By the Board and By Individual Members of the Board:

Some of the following factors or observations are subjective in nature, and are not as readily documentable as those in items 1-4 above. However, each factor listed has been reported to INPO evaluation, accreditation, or assistance visit teams; or directly to the Institute, on so many occasions that we are confident of their validity, and thus of the need to call each item listed below to the attention of the SMUD Board.

a. The board's frequent practice of making decisions by a 3-to-2 vote, or of electing personnel to key management positions by a 3-to-2 vote has the effect of giving the organization less than full confidence in the durability of those decisions, or of those managers.

This situation is exacerbated by actions by board members who vote against a policy (or an individual) in that these board members frequently publicly denounce the policy or the individual.

As a consequence, personnel in the organization do not accept policies and decisions with the wholehearted support that is so important in managing the nuclear technology.

As a second related consequence, managers hired by a 3-to-2 vote (which vote is known to all employees), do not have the implied confidence of the full board, and the unwaivering support of SMUD employees.

In our view these frequent 3-to-2 votes, and even more importantly the lack of support of the majority decisions, have diminished the effectiveness of some of the managers listed in Attachment 3, and have contributed to the excessive turnover described in section 3 above and in Attachment 3. (The validity of a 3-to-2 decision is not being questioned, nor is the need for board members to vote their conviction. Rather, it is the follow-on actions by minority voters that is of principle concern.)

b. Board meetings and meetings with individual board members take up an excessive amount of senior management time; time that should be devoted to managing the District's nuclear program. Board members frequently get directly involved in the management of the plant, rather than in setting the broad policies that govern management.

c. Board meetings are often excessively adversarial, both between board members or between factions of the board, and between board members and management. Since the meetings are public, these proceedings are observed by SMUD employees, or are reported to SMUD employees by the media. This situation serves to further undermine the orderly governance of the District's nuclear program.

INPO reported a concern over this matter in a letter to the President of the SMUD Board of Directors in April 1987, following plant and corporate evaluations conducted in February and March 1987. . . . . See Attachment 4

Subsequently, in a letter to the President of the SMUD Board in February 1988, following a January 1988 plant evaluation, INPO reported an improvement in the SMUD Board/management relationship during the recent recovery efforts, but also expressed a continuing concern. . . . . See Attachment 5

d. Individual board members are frequently critical of management and of policies regarding the nuclear program in public. This ongoing activity tends to further undermine the sense of direction and support at the nuclear station, and adds to the division between the board and employees.

e. As a consequence of the activities described in a - d above, employees at Rancho Seco face a uniquely troublesome environment in their daily lives. This environment includes:

- o a constant barrage of criticism of their company and their plant in both the local print media and local television
- o family members of employees -- spouses and children -- are subjected to derisive or critical comments about SMUD and the plant to a degree not seen in any other area of the country (This extends to public places, even including the schools.)

We conclude that the board's conduct, as described in a - d above, is the principle root cause of this situation.

These activities, taken in the aggregate, tend to undermine the morale and the professional pride of the managers, operators, technicians, and craftsmen at the plant. This in turn can have an adverse effect on performance.

f. On March 9, 1988, the SMUD Board adopted Ordinance 88-1. See Attachment 6. This ordinance was subsequently passed by voter referendum on June 7, 1988. The ordinance provides in paragraph 2 that:

> "The Sacramento Municipal Utility District must strive to achieve an annual performance goal of seventy percent (70%) capacity factor in the operation of the Rancho Seco Nuclear Generating Station beginning with the month that the plant achieves full power, and, if at any time after December 31, 1988, the performance level falls below a fifty percent (50%) monthly capacity factor for four successive months, then the plant will be permanently closed unless the Sacramento Utility District Board of Directors determines by a four-fifths vote that continued operation is in the best economic interest of the District."

Upon learning of this ordinance, INPO strongly objected to the above provision to the President of the SMUD Board of Directors by telephone on March 8, and on March 15, 1988. . . .See Attachment 7

In response to these phone calls, the President of the SMUD Board caused a second resolution to be passed on March 17, 1988 that was intended to put nuclear safety ahead of economic considerations. . . . . See Attachment 8

The SMUD Board's adoption of a resolution that included the paragraph quoted above represents exceedingly poor judgement by the governing body of an organization that holds a license to operate a nuclear plant. Such a resolution places an inordinate burden on the operating staff and could lead to non-conservative (and potentially unsafe) actions by plant personnel in an effort to keep the plant on the line, and in order to preserve their livelihood.

The reactor scram and steam generator dryout event that occurred on December 12, 1988 is an example of the kind of performance that can result from excessive outside pressure to keep a plant on the line. Plant personnel attempted to keep the plant operating by manually compensating for equipment failures when the prudent decision was to shut down. (See Attachment 2 for a description of this event.) In reviewing this event, one has to be concerned about the potential influence of Ordinance 88-1 on decision making by plant personnel.

Summary and Recommendation

As noted in section 1 above, upgrades to the plant and retraining of personnel were accomplished effectively during 1987 and 1988, and the plant ran well after its startup in early 1988. INPO's overall performance assessment, conducted following a plant evaluation in the Fall of 1988, recognized this. A Systematic Assessment of Licensee Performance (SALP) report for the period ending December 31, 1988, and recently issued by the Nuclear Regulatory Commission, reports an improving trend and overall favorable plant performance.

In our view, the plant is staffed with generally well qualified, capable personnel. The physical plant is now in acceptable material condition. The combination of the plant and its professional staff are a valuable resource to the people of the Sacramento District, and it has the potential to be an even more valuable resource.

However, after several years of observation, and in view of the matters described in this letter, we conclude that substantial changes are necessary for the continued successful operation of the station. Our concern is that, since the fundamental conditions that led to the poor record of performance described in section 1 and the recurring pattern of events described in section 2 have not changed, the plant's performance in the coming months and years will not be substantially altered.

We therefore recommend and request that the Board examine the District's approach to the governance, oversight, and management of the Rancho Seco Nuclear Station, and make the fundamental changes that are necessary.

We would welcome the opportunity to meet with Board members to further discuss these matters.

Because of the nature of the problems described in this letter, a copy is being provided to the Nuclear Regulatory Commission under separate cover.

Sincerely,

Zack T. Pate

Zack T. Pate
President

ZTP:lar
Attachments (as stated above)
cc/w: Mr. David A. Boggs
Mr. Joseph F. Firlit

Senator BREAUX. We will ask Mr. Pate questions, and then we'll hear from Mr. Shetler and Mr. Smeloff.

Thank you for appearing. I have a great deal of respect for what INPO does. I think you provide a very valuable service. An industry oversight committee is really rare and I guess, that's what INPO does. Not only to have the NRC as a regulator to watch over what's happening at plants, but also the industry has established their own oversight operation. And I think this is very, very good.

About the things that you pointed out in your testimony regarding the problems at Rancho Seco, let's see if we can discuss what has happened to those concerns. You point out, number one, economic incentives enacted for Rancho Seco in 1988, that INPO has been concerned about the potential for misuse of some of these indicators. Can you tell us what the concern is? Can you summarize for the record what the economic incentives actually were, and why does that give INPO a problem?

Mr. PATE. The resolution, or the ordinance, passed last June has a stipulation that the plant must operate at 50 percent capacity factor or better, and if not, a vote by the Board by a majority of at least four to one, is required to keep the plant in operation. I don't think those are the exact words of the resolution, Senator, but that's in effect what it says. So it places the plant staff under a situation where they feel, or may feel, their livelihood is threatened through permanent closure of the plant unless they can keep it operating. And our concern is that in their efforts to keep it operating, they may make a decision that is not as conservative as it should be.

Senator BREAUX. In other words, in layman's language, there's an incentive to keep the plant operating to achieve at least a 50 percent performance standard, because if you don't the plant is going to be closed by the Board of Directors, right, essentially?

Mr. PATE. Yes, sir. There is always that incentive, and that's desirable. But when the incentive goes to the point of permanently closing the plant because the plant did not achieve this particular performance measure, there is the implied threat that livelihood may be lost. That carries that incentive too far and can lead to a nonconservative decision.

Senator BREAUX. All right.

Now, INPO has pointed this out in your response, I guess, to the NRC, and also to the Board of Directors?

Mr. PATE. Yes, sir.

Senator BREAUX. Is this economic incentive program still in place?

Mr. PATE. In effect, I believe it is, yes, sir.

Senator BREAUX. You point out that this economic incentive is far more troublesome than some of the other problems that were pointed out. And yet, it's still there. It still is part of their operation manual, I guess. You point out in your testimony that nuclear safety should always be placed ahead of economic considerations. What, to your knowledge, has the NRC or the plant done to address INPO's pointing out how serious this economic incentive package is?

Mr. PATE. When we first learned of the ordinance last April, our action was to call the president of the SMUD Board. At that point

in time the resolution had been placed on the record, and could not be changed prior to the June referendum. In an effort to counter that resolution, the president of the SMUD Board asked the Board to pass a second resolution that stated for the benefit of plant employees that safety is foremost and does have greater priority than economic considerations. And the SMUD Board did that, and subsequently that resolution was communicated to the plant staff. So that partially compensated for the resolution and the ordinance.

But the fact that it was voted into law, in effect, still carries considerable weight and still is troublesome with respect to the operation of the plant.

Senator BREAUX. So the only thing that apparently has been done by the SMUD Board addressing this issue, the 50 percent incentive, we've got to produce at 50 percent or the plant's going to be shut down. That's still there. But the only thing that they've added to it is a resolution, apparently, that says, oh, by the way, safety is really our first priority though?

Mr. PATE. To my knowledge, that is a fair assessment.

Senator BREAUX. The other points that INPO had pointed out—the Institute's overall concern, and the reason for the letter, is that the history of governance and the present governance situation, if unchanged, could portend a continuing pattern of performance problems. Now, how many times has this particular plant been either shut down or restricted in its operations since it's been licensed?

Mr. PATE. Senator, I think that's best answered by noting that the lifetime availability of the plant is in the range of 37 percent, compared to most U.S. plants where the range would be in the range of 60 percent, where the designed goal of the plant, as stated by some members of the staff and Board, is 70 percent. So over the years, over the past several years, there's been a long history of sequential shutdowns.

Senator BREAUX. You pointed out that the history and pattern of actions by the Board is a major root cause of the long history of problems at the station. Now, my question, specifically, how have these areas that you've listed as problems with the governing situation with the Board, how has that been changed? What has been ordered to be done that is now being done differently from the time that your letter pointed out these problems in these areas?

Mr. PATE. The president of the SMUD Board has sent a letter to us describing actions taken in a Board meeting, subsequent to their meeting with the Nuclear Regulatory Commission, that describes Board support of working with the staff through the president of the SMUD Board rather than having each of the five individual Board members directing the staff as they may individually see fit. So that is a positive step. If carried out in practice, we believe that will help.

The letter also describes a plan to divest the Board of direct day-to-day control of the plant through contractual arrangements. I think the present negotiations are with Bechtel and Babcock & Wilcox, but the president's letter describes the Board's support to reduce the Board's direct role in oversight and get the Board out of the day-to-day management of the plant. Again, if that is put in place and practiced, that will be a second help.

So we see some positive signs since the letter, and since the meeting with the NRC, but I think only time will tell whether the governance situation really improves.

Senator BREAUX. Did your organization meet with NRC to bring these concerns to the members of the Commission?

Mr. PATE. Senator, the Institute is funded by the utility industry, but we have ample independence of any one utility. Since there are 54 members, we can take a strong stand with any one. We also operate independently of the NRC. We interact with our members and push them toward excellence, toward the very best quality of plant operations. So on a day-to-day basis, we do not communicate with the NRC on the interactions we are having with our members. In this particular case we did simultaneously advise the NRC, because we knew this letter would be made public.

Senator BREAUX. Okay.

So you advised NRC of your concerns with Rancho Seco. What was NRC's response to your industry group telling them about the concerns with Rancho Seco?

Mr. PATE. My knowledge of those actions was that they asked the SMUD management not to start up the plant until they could have a meeting and fully understand our concerns, which, of course, SMUD complied with. And then they held a meeting with the SMUD Board and with senior management from SMUD, some three days after receiving our letter.

Senator BREAUX. And as a result their meeting with SMUD, and they will tell me about the meeting, of course, but as a result of that meeting the Commission did not object to the resumption of the power operations at Rancho Seco?

Mr. PATE. That's my understanding. Yes, sir.

Senator BREAUX. I may have some additional questions, Mr. Pate, but I want to recognize that our distinguished Ranking Member is here. I don't know whether he has any opening comments at this point, what's your desire?

OPENING STATEMENT OF HON. ALAN K. SIMPSON, U.S. SENATOR FROM THE STATE OF WYOMING

Senator SIMPSON. Thank you, Mr. Chairman. I do join with you in welcoming this panel, and these groups of witnesses.

You have brought up some important nuclear licensing issues, and you have been a moving force, indeed, behind this hearing. I certainly share your concern in every way for ensuring the integrity of the Nuclear Regulatory Commission process. You and I have discussed that before.

I do just want to briefly note that this will be one of the last times that Admiral Zech appears before the subcommittee in his capacity as NRC Chairman. I have always appreciated his candor, his integrity, and his insight into some terribly difficult questions that we have to address. He oversaw a major staff reorganization and a consolidation into one building of over half the NRC headquarters, no small accomplishment. And he worked very hard to improve the nuclear powerplant licensing process, not only by promulgating the recent rules with respect to standard plant design and certifications, but also by ensuring that the State and local

governments cannot impede the licensing process by refusing to participate in emergency planning, which we knew would hang us up as we crafted that legislation many years ago. And sure enough, it did hang us up, and it will hang up the people that have hung it up, that's the fun of it. We'll watch that happen.

Those were good efforts, hands on efforts. I admire that. And critical ones if the nuclear industry is going to survive, and maybe even again, thrive. So, I commend you, Chairman Zech, for your hard work over the last 5 years, and I wish you well. I personally admire you greatly.

Mr. Chairman, I look forward to hearing the testimony from the witnesses regarding these possible safety problems of Rancho Seco, and the impact of certain settlement agreements on the Comanche Peak licensing proceeding. I don't have any questions at this time, and I thank you very much.

Senator BREAUX. Thank you, Senator Simpson.

I'm glad that the distinguished senior Senator from Nevada is here, Senator Reid. Any questions of Mr. Pate, or comments?

OPENING STATMENT OF HON. HARRY REID, U.S. SENATOR FROM THE STATE OF NEVADA

Senator REID. Thank you, Mr. Chairman, I have a statement that I wish to enter into the record. Part of that statement lends support to Senator Simpson's statement regarding the services of Admiral Zech.

I would also say, just in passing, Senator Simpson, this is my first seven camera hearing. We really have them. Count them.

Senator SIMPSON. I didn't count. Well, everyone strives for one of those.

Brush your teeth and get your best clothes, come right in.

[Senator Reid's statement follows:]

OPENING STATEMENT OF HON. HARRY REID, U.S. SENATOR FROM THE STATE OF NEVADA

Mr. Chairman, thank you for calling this hearing today to review Nuclear Regulatory Commission procedures involving safety concerns at the Rancho Seco Generating Station and secret settlements at Comanche Peak Nuclear Power Plant.

In early 1987, this Subcommittee held a hearing on the NRC's budget request for fiscal year 1988. The hearing was the first opportunity I had as a United States Senator to learn of NRC functions and programs from the Commissioners. At that hearing, NRC Chairman Lando Zech outlined the agency's budget proposal; but he also discussed some of the problems that continue to plague the nuclear power industry.

As you know, many of these problems deal with perceptions. I recall the Chairman's mention of Three Mile Island. He said "Public confidence in nuclear power was shaken by the TMI accident. The Chernobyl accident has exacerbated the situation. We believe there are serious challenges today in order for our fellow citizens to continue to review the benefits of nuclear power."

We on this Committee are well-aware of the NRC's mission—the regulation of the nuclear industry to ensure the continuing safe use of nuclear power. I am also aware of Chairman Zech's commitment to obtaining the safest operation of nuclear power facilities that is possible. But, if the public perceives that the regulatory agency is lax in its responsibilities, then there is definitely a problem.

It seems to me that questionable economic incentive agreements and secret settlements undermine the public's confidence in the regulatory process—fostering additional fears of nuclear power. These issues also raise serious policy concerns that need to be addressed.

Perhaps more diligent oversight by the NRC would have served to address some of these issues. In any case, I look forward to the testimony presented by the wit-

nesses before us and hope they can provide additional insight into many of these areas. Thank you.

Senator REID. I think it's important to mention, and certainly we all know of Mr. Pate's reputation, which is good, but I think I should mention that before we bury you with bouquets, we have to underline what you've already told us. As indicated in your written statement and the oral statements that you've made before the committee, you're sponsored by the nuclear utility industry. The reason I mention that, is that I think that not only do we have a concern with the problems about which the Chairman has addressed in this hearing, but with my number one concern in the State of Nevada being the nuclear waste industry. We have no one to help us in the State of Nevada. We're out there alone with this mad train that's rushing toward Nevada with 70,000 tons of nuclear waste on it.

With the new bill that was passed dealing with nuclear waste, there's only one site being characterized, no others. In the 1982 Act, there were three sites going to be characterized, which would have given the Nuclear Regulatory Commission some leeway in choosing the best of the three sites. The pressure that will be placed on the Nuclear Regulatory Commission to license and give their stamp of approval to the high-level nuclear waste repository in its permanent state will be incredible, because if, in fact, they don't license that site, then we have to start all over. And I think that the American public should be concerned.

On my last visit to Nevada, I was given a book called, "The Day They Bombed Utah". I don't know how many have read that book, but it's frightening what the Federal Government did to the people of Nevada, to parts of Nevada and Utah with above-ground nuclear testing which took place for the better part of a decade. I think that that same situation could prevail in the State of Nevada with locating this high-level nuclear waste repository there. I think what Congress has done to the State of Nevada is bad, and Nevada is going to continue to fight to try to bring to the awareness of the American Public what's going on there is wrong.

And perhaps by recognizing the transportation problem, somehow we have to bring across this Country—most of the nuclear waste, of course, is produced in the eastern and southern parts of this Country. Maybe we can try to bring enough alarm to the American public that this is going to be hauled through the streets of St. Louis, the streets of Denver, Salt Lake, other places. And maybe we could bring some awareness of this problem to the American public.

And I wish, Mr. Pate, that I had more confidence in the nuclear utility industry. And I think it's important that you recognize, as you have, that you're sponsored by them. But I wish we had somebody that was sponsored by the American public to try to help us in Nevada with this nuclear waste repository that's booming forward.

Thank you, Mr. Chairman.

Senator BREAUX. Thank you, Senator.

Next we'll hear from Mr. Edward Smeloff. Mr. Smeloff, we're delighted that you're here. We'd be pleased to receive your testimony.

STATEMENT OF EDWARD SMELOFF, MEMBER, BOARD OF DIRECTORS, SACRAMENTO MUNICIPAL UTILITY DISTRICT

Mr. SMELOFF. Thank you very much, Mr. Chairman, and members. Thank you for the opportunity to testify today.

My name is Ed Smeloff, and I'm a director of the Sacramento Municipal Utility District. I was elected to represent the Third SMUD Ward in November 1986. I'm now the second and most senior member of the SMUD Board, and I'm the one SMUD Board member who attended both hearings of the Nuclear Regulatory Commission, one last year on March 22, 1988, and this year on April 7, 1989.

I'm here today, as one member of the SMUD Board to testify in response to the subcommittee's concerns about the Rancho Seco Nuclear Generating Station. I want to make it clear that the viewpoint I express represents my viewpoint. The Board as a whole has not met in a regular session to adopt a position regarding the concerns of the subcommittee.

As I understand it, the subcommittee is concerned about the manner in which the Nuclear Regulatory Commission addressed issues identified by the Institute of Nuclear Operations in their April 4 letter to the SMUD Board. Specifically, the issues are the SMUD's economic incentive resolution and the adversarial debate about Rancho Seco that is occurring in Sacramento. Both of these issues have been identified as having a potential impact upon the safe operation of the plant.

First, I'd like to address the economic incentive resolution. It's my view that the Nuclear Regulatory Commission shares responsibility with the SMUD Board for adoption of this policy. The economic incentive resolution is part of an overall policy proposed by the majority of the SMUD Board of Directors and adopted by the voters in June 1988. That policy authorized a test run of the nuclear facility for a period of time, up to 18 months, to be followed by another vote of the electorate in Sacramento on whether or not the plant should continue to operate. The policy was placed before the voters of Sacramento for ratification as an alternative to a citizen's sponsored ballot measure that would have closed the plant.

Since we're a municipally owned utility, and in California the voters retain the right to set policy over municipally-owned utilities. They have the right of initiative, which they exercised in 1988. The economic incentive resolution stated that SMUD would strive to operate the plant at a 70 percent annual capacity factor, and that if the plant operated at less than a 50 percent capacity factor for 4 consecutive months, that the plant would be permanently closed unless four-fifths of our Board voted that it should be continued to be operated. That language of the economic incentive resolution was intended to ensure the public of Sacramento that the plant would be run economically.

In the words of the Board member who authored the policy statement, the economic incentive resolution was to offer true, secure stopping points from any reckless expenditure of monies. That policy was adopted by a four-one vote of the SMUD Board. I was the one dissenting member.

Following the decision by the SMUD Board of Directors to place the policy statement before the voters, the Board was summoned to explain this policy to the Nuclear Regulatory Commission on March 22, 1988. At that meeting of the Nuclear Regulatory Commission I testified as follows: In order to reassure the voters of Sacramento that these economic consequences of continued operation would be minimized, the 50 percent capacity factor criterion was added to the ordinance. It was clear to me that the economic criterion was being given priority in determining how much additional resources would be devoted to the nuclear plant. Furthermore, no discussion occurred at the time as to what affect giving a priority to economics would have on the performance of Rancho Seco. There can be no doubt that the language of the ordinance places additional pressure on the workers to keep the plant running in the short-run at the expense of long-term safety. The existence of that pressure was acknowledged by Mr. Andinini, who at that time was the head of our nuclear program. I told the Commission in my opinion, the clause of the ordinance places undue pressure on the Rancho Seco management and workers to meet economic criteria and could jeopardize the safe operation of the facility.

The only direct response I received for my concerns from members of the Commission was from one Commissioner, Frederick Bernthal. Mr. Bernthal's comments were to the point and very thoughtful. He stated to the SMUD Board that he did not object to setting down guidelines for nuclear power plants over a relatively long period of time. And he thought that a number of State utilities had done such. And by a long period of time, he indicated he did not mean 18 months. He said, I think that we talked 3 to 5 years, because then you do not get in the situation where you have people and managers with their jobs depending on meeting a certain level of operation, a certain capacity factor. That is the thing that concerns me about what you have done here, and I would suggest to the Board and its directives to the extent that you are now able, consistent with the actions you've taken, to get on the record and make it clear to the managers of the plant and others that they are to run the plant in away that its, consistent with public health and safety. That was an important statement by Mr. Bernthal, but the Commission did not act upon that statement.

At the time of the Commission hearing, March 22 of last year, the measure could have been removed from the ballot by the request of the SMUD Board. Even afterwards, the SMUD Board retains the legal authority of modify or to remove that section of the ordinance.

Clearly, the SMUD Board was careless in drafting a policy on economic performance for the plant. The policy was hurriedly drafted without consulting experts in the field. The Nuclear Regulatory Commission, in my opinion, shares in the responsibility for this policy by not providing us with a clear statement of their view regarding the economic incentive resolution.

Let me move on to the second issue that you've identified. And that is the issue of adversarial climates about Rancho Seco in Sacramento and the effects that such an environment may have on the employees of the plant. The concern about this issue is identified in INPO's letter of April 4. In that letter, INPO describes the

uniquely troublesome environment created by some actions of the SMUD Board. INPO identified several specific actions it believes to be the cause of the performance problems at the plant. INPO admits that its observations about the Board, our actions, are subjective in nature, and are not as readily documentable.

While it's my impression that INPO has done a thorough and excellent job of identifying technical problems at Ranch Seco, I believe that their comments related to governance of SMUD have been made without a thorough investigation of the facts. Nonetheless, it's my opinion that the general thrust of their comments are important and deserve serious consideration.

INPO has noted that one of their concerns is that SMUD Board meetings are excessively adversarial. Let me say that our Board meetings are open to the public and we do deal with controversial issues. It's not unusual that there would be vigorous debates in a publicly elected body. In most circumstances it's my belief that a vigorous debate, followed by decision making, does no harm, even if that debate does not result in a unanimous decision of the Board. Although I think INPO's statement that many decisions are made on a three-two vote, when you look at the facts, it's not correct. And I provided INPO with that information.

Last year, though, there was one decision that the SMUD Board made that was very troubling to me, and I think undermines steady management of the utility. The majority of the SMUD Board of Directors last June fired the general manager, which had been recently recruited, and at the same time our Chief Executive Officer for Nuclear Operations resigned. That turnover was a major issue identified by INPO. Clearly, management of a utility and a nuclear operation has a lot to do with safety and performance, and it's troubling when you have a major change in management.

Since the changeover in senior management, it's my view that the improved performance that we noted earlier at Rancho Seco has declined. We've had a number of troubling incidents in the last several months.

Let me try to summarize what I see as the important overall issue identified by INPO. And that issue is, how does SMUD and the Nuclear Regulatory Commission assure that safety at the plant is not compromised in a highly politicized environment that's been created in Sacramento by the upcoming votes on Rancho Seco. In Sacramento we will have voted twice on whether or not Rancho Seco should continue operation in the future. An election obviously creates an environment that is highly charged, where the debate is contentious, where the debate is political. The question is, under those circumstances how do you maintain a high standard of safety.

Let me to say, to protect their jobs at the plant many of the employees are taking an active role in the campaign on the ballot measure. The Chief Executive of Nuclear Operations at the plant commented on this situation at the April 7th, 1989 hearing of the Nuclear Regulatory Commission. He said, we don't enjoy the luxury of being an investor-owned utility where the utility can invest their money to have publicly paid ads to talk about their nuclear powerplant. We've had to do that with employee contribu-

tions, and our employees have made those contributions. Our employees have made telephone calls. Our employees walk the community. Our employees give speeches in the community about Rancho Seco. We've had to carry the load in that perspective.

It should be clear from that statement that the June referendum weighs heavily on a lot of people at Rancho Seco. Given the recent incidents shutting down the plant, there is without doubt enormous pressure to show that the plant can be productive through the remainder of time prior to the election. The potential for employees to be pressured to keep the plant operating even during adverse circumstances is high. The next 5 weeks before the June election will be a critical time for the safe operation of the plant. Both SMUD and the Nuclear Regulatory Commission need to be extra vigilant during this period of time.

To conclude, it's my view that what has occurred at Rancho Seco recently points out two important challenges for the nuclear industries. The first challenge is to accommodate the interest that publicly owned utilities, and in some instances, state utility commissions, may have to use economic criteria to protect ratepayers from unproductive performance of a nuclear facility without placing undue pressure on plant management and employees to operate the plant in an unsafe manner. We have to balance those two considerations, protection of the ratepayers from an unproductive facility guaranteeing health and safety as a top priority.

The second challenge for the industry is to reconcile the public's rights to vigorously debate the economics of a nuclear plant with the need to provide a stable working environment at the plant. These are difficult challenges. I hope our experience in Sacramento can be helpful to this subcommittee and to the Nuclear Regulatory Commission in shaping policies to assure that nuclear power is used in a safe manner. Thank you.

Senator BREAUX. Thank you, Mr. Smeloff.

Mr. Shetler, your testimony?

STATEMENT OF JAMES SHETLER, ASSISTANT GENERAL MANAGER, RANCHO SECO NUCLEAR GENERATING STATION

Mr. SHETLER. Thank you, Mr. Chairman, Senators.

My name is James Shetler and I am Assistant General Manager at the Rancho Seco Nuclear Power Plant owned and operated by the Sacramento Municipal Utility District. The District is, in turn, owned and directed by its customers, the citizens of Sacramento County, through a five person elected Board of Directors.

President of that Board, Joseph Buonaiuto, asked that I present a letter addressing the issues you raised in your April 21 letter inviting the District to these hearings. And I would like to read from that now:

DEAR SENATOR BREAUX: Let me again apologize for our absence before you today. As I mentioned in my letter of 21 April we have a previously scheduled rate hearing. The public notification requirements of California municipal utility districts' code make rescheduling extremely difficult. It is for this reason that we appreciate your recognition of the importance of local rate issues to a utility of our size.

Regarding your specific concerns as you enumerated them in your 21st April letter, let me respond as follows: Number one, we have the greatest respect for the NRC safety review process, and we do so from the perspective of having experienced evaluations of both bad and good performance. Because we have seen how stringent

these evaluations can be, we are especially pleased with the positive tone of the most recent SALP report.

Number two, INPO's comments on the SMUD Board creating a political environment harmful to safe plant performance may have suited an earlier SMUD or a previous Board of Directors. The actions of this Board, the performance of the staff and our testimony of last month before the full Nuclear Regulatory Commission clearly evidence a new team and a new spirit at SMUD. The process of strengthening and honing ideas through debate and aggressive discussion thrives here in the West. But none of us have lost sight of the safety issue or our responsibility to those who elected us.

Number three, I think our commitment to safety is clear, and well documented. Not to belabor the point, but by way of illustration I'd like to offer an observation made by Director Peter Keat in his testimony last month before the full Nuclear Regulatory Commission, "There is a consensus on one issue, and that is the consensus that crosses the board among supporters of nuclear power, among critics of nuclear power and among operators, and that is that the consequences of not making safety the top priority are totally unacceptable."

Plant performance ending 30 April exceeded performance criteria established in Measure C putting to rest any question in the plant's ability to perform and the staff's ability to operate it safely.

The SMUD Board of Directors is singular in our insistence on safety as the overriding concern at Rancho Seco. Again, let me extend our thanks for the consideration shown by Chairman Breaux. I'm confident that Mr. Shetler can answer any questions you may have. Thank you for your attention.

Sincerely,

JOE BUONAIUTO,
President, Board of Directors.

Senator BREAUX. Let me interrupt you at that point and ask you a question. Is that the same man that was quoted in the Sacramento Bee as suggesting that Senator Breaux should mind his own business, and "I don't believe Senator Breaux is a SMUD customer," said Buonaiuto?

Mr. SHETLER. To my understanding, that's the same individual. Yes, Senator.

Senator BREAUX. Thank you. Nice letter to follow, I guess.

Mr. SHETLER. For my own part, Mr. Chairman, let me say that Rancho Seco began operations in 1975 and through 1988 provided over 41 billion kilowatt hours of electricity to benefit its customer-owners. That generation has helped the District to maintain rates that are today almost 20 percent below its major neighbor utility. It has also saved this Nation from importing approximately three billion gallons of oil, contributing significantly to the cleaner environment we all value.

Rancho Seco has been a unit undergoing a major recovery effort to improve the condition of the plant, programs, and personnel. Over the last 2 years, the backlog of corrective maintenance items has been reduced from approximately 5,200 to approximately 700. The preventive maintenance program has been placed on a sound footing and now represents greater than 50 percent of our maintenance efforts as compared to approximately 10 percent 2 years ago. Our programs have been improved and are continuing to be fine-tuned. The plant personnel are more proactive in their involvement in the plant and programs. You will see the managers and superintendents out in the field with their people. Our industrial safety record has had a marked improvement. For the first time in the history of Rancho Seco, we have exceeded one million manhours without a lost time accident and are rapidly approaching two million manhours. We acknowledge that we still have a distance to travel in our goal to be one of the best run nuclear plants in the

United States by 1993. However, we have made progress and we are on our way.

With respect to NRC oversight, I would like to reinforce Mr. Buonaiuto's statement that we have found NRC inspections to be both tough and thorough. I believe that these inspections have shown that Rancho Seco is improving. This is not only evidenced by the SALP results, but also by the NRC's recent action to remove Rancho Seco from their troubled plant list.

Another issue that has been raised by various parties is the safety impact on plant personnel of the performance criteria from Measure C. I know of no group more dedicated to safety operations of Rancho Seco than the men and women who work there. Not only do we have a legal obligation to run a safe plant, but we feel a moral obligation to do so as residents of our community.

I will be happy to answer any questions you may have at this time.

Senator BREAUX. Thank you, Mr. Shetler. Thank both of you for your testimony.

Mr. Smeloff, you've had the general manager fired, the chief executive officer is gone. You have a statute that says that if you don't operate the plant at 50 percent of its capacity you're going to shut it down. It's been operating, according to your testimony, at 40 percent of capacity since December 1988. The NRC says it's all right to restart it. Now, specifically, can you tell the committee what has been done to address the INPO concerns that were sent to the SMUD Board, how has it been corrected to justify it being restarted when it looks like you've got some major problems out there? Specifically, what has been done to address the INPO concerns from your own industry?

Mr. SMELOFF. As Mr. Pate stated, the Board did adopt two resolutions following the testimony to the Nuclear Regulatory Commission. I don't believe that they're sufficient, but let me describe them to you.

One was to centralize communication to our staff through the general manager. That, in essence, had already been the operating procedures that the Board members had used. The second was to begin negotiations with Bechtel, and Babcock, and Wilcox for a management contract for the plants, to take over some specific functions at the plant, primarily engineering and maintenance functions.

Senator BREAUX. Has that been done?

Mr. SMELOFF. The negotiations have begun. These are complex negotiations. They're not——

Senator BREAUX. You're still negotiating? You haven't signed——

Mr. SMELOFF. Yes, we're still negotiating. There is no memoranda of understanding, nor any contract, nor is it clear that that specifically would take care of INPO's concerns.

My belief is that strong Board oversight is critical to the safe and productive functioning of a nuclear facility. And in previous years, I believe, that boards have not exercised that responsibility as diligently as possible.

Senator BREAUX. Do you have a general manager in place, and a new chief executive?

Mr. SMELOFF. We do have a new general manager, and we do have a new chief executive of nuclear operations. I think that they are functioning adequately in those positions. It does take some time for people at that level to learn the organization. The chief executive for nuclear operations had been at the nuclear plant for a period of time before he assumed that responsibility. I have confidence in those two individuals.

I think the troubling environment has been created by the two elections. And the reason for the elections was—the first election—was an unresponsiveness of the SMUD Board to request from people in the community to take a look at the economics of Rancho Seco, to compare the economics of operating the plant with alternatives. It was the reluctance of the Board of Directors to do that that triggered a citizen's sponsored initiative, that put on the ballot. Both of those, that initiative and then the SMUD response, which caused a second election, I think have been the root cause of the difficult environment. It is difficult to recruit people in a circumstance where you have an election on the plant ahead 6, 12 months.

Senator BREAUX. What specific instructions or requirements did the Nuclear Regulatory Commission give to the SMUD Board when you all met with them?

Mr. SMELOFF. We met with them twice, as I mentioned, in March 22, 1988, Commissioner Bernthal requested us to take some actions consistent with what had previously happened, to state that safety is first. It is absolutely clear that as a question of policy and philosophy that this Board of Directors is committed to safety first. It did make an error, in my judgment, in wording the economic incentive resolution the way that it did. I wish that the Commission had given us a clear response to their view of that resolution. They did not.

Senator BREAUX. What other specific instructions did the NRC give you?

Mr. SMELOFF. Other than that, the NRC did not give us specific instructions.

Senator BREAUX. Are you telling me that INPO, the industry group that raises all of these concerns that Mr. Pate outlined, that when the SMUD Board is called on the carpet before the NRC, that the only instruction you got back from the NRC as to how to correct these problems was to pass a resolution saying, in essence, that you believe in safety first?

Mr. SMELOFF. Let me correct it.

That was the instructions given to us March 1988. In April 1989 when we met, we were not given any specific instructions by the NRC. The NRC heard testimony from each of the Board members as to their concern for safety. But we received no instructions from the NRC.

Senator BREAUX. Did they not even address or tell you to change the policy of the Board that says we're going to shut the plant down if we don't run it at 50 percent?

Mr. SMELOFF. No, they didn't. And I asked the Chairman of the Commission specifically for advice. I asked him, what would you advise us to do as a result of this economic incentive resolution. And I believe the Chairman said it was his view that he did not

approve of referenda in general, nor referenda that included economic performance standards. But we were not given any specific advise or instructions.

Senator BREAUX. But they said it was alright to restart it?

Mr. SMELOFF. Well, actually the Commission never sent a confirmatory letter or prohibit us from restarting. We voluntarily decided not to restart the plant until we could have the opportunity to talk to the Commission. And they had no objection after that meeting of restarting the plant.

Senator BREAUX. Senator Simpson, any questions?

Senator SIMPSON. Mr. Chairman, I thank you.

In remembering my days in your chair, Mr. Chairman, I was always very impressed with INPO. I think it's important for the record to show that INPO is not just a lobbyist group. In my mind INPO is a very responsible industry operation trying to save their business from certain operations and operators, and management persons who are sloppy. That's how it came to pass, sloppy and just didn't care about safety and excellence. INPO made the difference in the dark days after Three Mile Island. So I don't ever look upon them as a "lobbying group." It's my opinion that they got involved deeply because there are some very responsible people who didn't like taking the knock on the reputation for some of the clods in their business. So I think that's an important thing to discern.

But I guess the puzzling thing to me is Ordinance Number 88-1 of March 9, 1988. Why did the SMUD Board think it was necessary to enact the economic incentive resolution? What was the purpose of that?

Mr. SMELOFF. What had occurred, Senator Simpson, was there was a ballot measure on the June ballot, sponsored by a citizens' group. It was the concern of the majority of the SMUD Board that that ballot measure would pass, permanently closing the plant. So the Board's majority decided to offer an alternative to the voters, which would be a test run of our facility, an 18-month trial run of Rancho Seco, followed by a second vote, in order to give the appearance, at least, that there were going to be strict economic standards to judge that plant. The majority of the Board put in those two capacity factor criteria, 70 percent—strive to achieve 70 percent over the 18 months. And a minimum capacity factor criteria that had to be met or the plant would be automatically shut down.

I think it was a political matter. It was a way of structuring a ballot proposal that gave the appearance of having strict economic standards so that the voters would approve that. I think it was ill-conceived and not done with—I think what we should have done is consulted some experts in the field, such as INPO, and gotten their advice before structuring that kind of ballot measure.

Senator SIMPSON. Well, there are plenty of those people running around, I can tell you that, experts in this field. Experts who want to kill nuclear power, and experts who say the opposite to a degree, which is frustrating to us, too. But the issue, whether you hate it or like it, is the public health and safety. There is no other purpose for the NRC. It has no function other than guaranteeing or assuring the public health and safety. And I think when you get tangled up in the impact of a resolution like this, and not give any intent, or at least thought to the resolution or the impact of this resolution

on the safe operation of the plant, I think that everybody's lost sight of the target in this business.

That's my view.

Senator BREAUX. Thank you, Senator. I want to thank both of you. You have a very challenging job out there. It's not going to be easy. There's been numerous questions raised. You've got a real challenge with regard to Rancho Seco. We're going to hear from the Commission and to see what their views are on this, and what they've done or haven't done. But I thank both of you for appearing. I think you've been very helpful.

Mr. SMELOFF. Thank you, Senator.

Mr. PATE. Thank you.

Senator BREAUX. I'd like to welcome up the Nuclear Regulatory Commission at this time, Commissioner Lando Zeck, the Chairman, Commissioner Tom Roberts, Commissioner Ken Rogers, and Commissioner Jim Curtiss.

Admiral, I also want to join Senator Simpson in extending to you my congratulations for your service. I want to say that you and I have always had a very close, personal relationship. I've had a great deal of respect for your integrity with regard to your dealings before this committee. I don't know whether this will be the last appearance. I understand it may well be. We wish you the very best and thank you for your service to your Government in yet another capacity. It's been noted and I compliment you for your service.

Mr. ZECH. Thank you, Mr. Chairman.

Senator BREAUX. Having said that, I welcome you all and would ask that if you can, you summarize your statement so that we may get to questions.

STATEMENT OF LANDO W. ZECH, JR., CHAIRMAN, NUCLEAR REGULATORY COMMISSION, ACCOMPANIED BY THOMAS M. ROBERTS, COMMISSIONER; KENNETH C. ROGERS, COMMISSIONER; JAMES R. CURTISS, COMMISSIONER; AND WILLIAM PARLER, GENERAL COUNSEL

Mr. ZECH. Thank you very much, Mr. Chairman.

Before I begin, let me thank you for your very kind remarks, as well as Mr. Simpson and Mr. Reid. It has been a privilege to serve my Country. I believe that the opportunity I've been given is a very important one, and I have done the best I could to make a contribution to my Country. I appreciate very much your kind remarks.

Mr. Chairman, and members of the subcommittee, the Commission is pleased to appear before you today. As you're aware, Commissioner Carr is unable to be here. We are here to discuss legal and policy implications of settlement agreements affecting the ability of persons to testify before the Nuclear Regulatory Commission. We shall also address the recent restart of the Rancho Seco plant.

Mr. Chairman, we have a brief opening statement, and with your permission we request our full testimony be included in the record.

With regard to the matter of settlement agreements, the Commission wishes to emphasize that it strongly supports the widely accepted general policy favoring settlement of disputes by the affected parties in adjudicatory proceedings. Settlement agreements

that minimize or avoid the need for expensive and time-consuming litigation are in the interest of all parties and, therefore, desirable. However, to provide some assurance that settlement agreements will meet NRC's standards, all settlements of issues raised in NRC proceedings must be approved by the presiding officer. This was done in the stipulated agreement agreed to by the Texas Utility Electric Company, intervenor Citizen's Association for Sound Energy, and the NRC staff, in which these parties asked the presiding licensing board to dismiss the Comanche Peak Operating License proceeding. That agreement specifically provided that parties could bring any safety issues to the NRC.

Nevertheless, not all agreements affecting the ability of an individual to provide safety information to the NRC would necessarily come before the NRC for review and approval. The settlement agreement between Joseph Macktal and Brown & Root is, of course, an example. Since Mr. Macktal was not a party to or otherwise a participant in an NRC proceeding, there was no opportunity for the NRC to ensure that the agreement made it clear to Mr. Macktal that he could come directly to the NRC staff or to the Commission itself with any safety concern.

The NRC has taken actions over approximately the last nine months to address the question of Mr. Macktal's additional safety issues. In late September 1988, in spite of his numerous contacts with the NRC we received information indicating that Mr. Macktal had not provided NRC will all his safety concerns. That information came in the form of an affidavit by Mr. Macktal attached to a pleading filed by Citizens for Fair Utility Regulation. To the extent Mr. Macktal's affidavit provided enough specificity, the technical staff began reviewing his allegations to determine if additional staff work was needed to address those allegations. On December 21, 1988, the Commission issued an order, CLI–88–12, which clearly indicated that the NRC did not view the settlement as prohibiting Mr. Macktal's raising safety concerns with NRC. Although Mr. Macktal's attorneys were aware of this decision, and in fact have filed pleadings addressing that issue, Mr. Macktal did not bring his concerns to the NRC after the Commission gave its view that he was permitted to do so. After attempts to contact Mr. Macktal directly and through his attorneys, late last week the NRC staff was able to reach Mr. Macktal. Although he indicated that he did have safety concerns, he declined to provide the NRC with them at this time, but instead referred the staff to his attorneys. The NRC is currently working with Mr. Macktal's attorneys in an attempt to find out what, if any, additional safety concerns he has.

The Commission believes that agreements settling Section 210 issues must provide an opportunity for the settling parties to bring health and safety concerns directly to the attention of the Commission in order to be consistent with the policies underlying the Atomic Energy Act and the Energy Reorganization Act.

We are considering changes to our regulations to specifically require that such settlement agreements make that clear. The Commission has also written to the Secretary of Labor on this issue, and we're attempting to determine if there are other settlement agreements under Section 210 of the Atomic Energy Act with potentially unacceptable conditions.

Precisely how these matters might bear on the legality of the Macktal agreement, and which way any balance of public interest versus private convenience might tip, are matters which I understand are presently before the Department of Labor. In view of the legal and factual questions which are now before the Department of Labor in Section 210 proceedings, I do not believe that the Commission should express a view on how the case should be decided. For this reason, in its order of April 20, 1989, the Commission went no further than withdrawing its remarks made in a previous order about the acceptability of the Macktal agreement.

The agency is now actively reviewing our directives in this area and will make changes in them if necessary. The objective of this effort is to ensure that parties to settlement agreements understand that they have the opportunity to provide information directly to the Commission.

And now, with your permission, Mr. Chairman, we would like to discuss the operations of the Rancho Seco Nuclear Generating Station very briefly.

Mr. Chairman, you expressed your concern over the actions of the NRC in response to the April 4, 1989 letter from the Institute of Nuclear Power Operations regarding the operation of Rancho Seco. First, let me explain the background of the events before and subsequent to that letter.

The Executive Director for Operations and I first were made aware of INPO's concerns about the actions of the Sacramento Municipal Utility District's Board of Directors on April 3, 1989. I notified my fellow Commissioners and it was agreed that it was advisable to request that the plant, which was not operating at the time, remain shut down until the Board of Directors could respond to INPO's issues. The utility agreed to remain shut down and the Commission directed on short notice that the SMUD Board of Directors come to Washington for a public meeting. On April 7th, 1989 the Commission met with the SMUD Board of Directors and utility senior management responsible for Rancho Seco as well as senior NRC officials cognizant of the plant to address the issues raised by INPO.

Based on our review of the available information, the presentations we heard at the April 7th, 1989 meeting, the commitment of the SMUD Board that safety has been, and will continue to be the first and foremost consideration of the operation of Rancho Seco, and the continued close monitoring the NRC staff, the Commission did not object to the resumption of power operations at Rancho Seco.

The detailed issues discussed by INPO were regarded as potential safety concerns deserving serious and thorough NRC review. The issues had previously been extensively evaluated by the NRC in conjunction with an overall performance improvement program that began at Rancho Seco after NRC imposed plant shutdown on December 26, 1985. Our ability to quickly evaluate INPO's concerns was possible because of past and continuing NRC evaluations of Rancho Seco's operating difficulties. We concluded, as did INPO, that there was no immediate safety concerns at Rancho Seco.

Since the March 1988 restart, the NRC has been satisfied that plant upgrades were effective and that operations at Rancho Seco

have improved substantially. Only two events detract from an otherwise impressive record of safe operations since the 1988 restart, and the follow-up of these events were handled well by the licensee. We are very much uncertain of the future of Rancho Seco and the resultant stress on plant workers. Our augmented coverage will continue at least through the June 1989 election when the immediate future of the plant should be determined. The stressful environment for Rancho Seco workers has not resulted in unsafe nuclear plant operations and the Commission concludes that Rancho Seco has been, and can continue to be, operated safely.

Mr. Chairman, this completes our statement. We shall be pleased to answer your questions.

Senator BREAUX. Do any of the other Commissioners have an independent formal statement?

[No response.]

Senator BREAUX. Admiral Zech, you heard the outline in my opening statement. Some of the laws that we have before us dealing with settlement agreements, dealing with the rights of employees to participate in testifying before an agency such as NRC, I quoted the fact that basic contract law says that contracts for the suppression of testimony are void as against public policy. Secondly, I pointed out that section 210 of the Energy Reorganization Act clearly points out that testifying is a protected activity not only under the law, but also under the NRC's own regulations; which we have. I cited the public bribery statute, which makes it a crime for anyone to offer anything of value to a witness to be absent from a proceeding before a Federal agency like the NRC.

I pointed out, also, your own letter signed by Vic Stello that apparently was sent April 28, again, right after our hearing was announced, and was sent to all licensees in the Nation. This letter notifies that it is not acceptable to include in any settlement agreements any restrictions on an employee or former employee providing information to any member of the NRC, including your staff, your inspectors, your investigators, administrative law judges, boards, or the Commission itself. We have a letter or an opinion from your own general counsel, William Parler, dated April 24, again, in close proximity to this hearing, which your general counsel says, "A question has arisen regarding the permissible scope of the provisions of the settlement agreements. * * * I have concluded that a section 210 settlement agreement which imposes such restrictions is both clearly contrary to the policy objectives of the Atomic Energy Act of 1954, as amended * * *, and the Energy Reorganization Act of 1974, as amended * * * any such provisions should be unenforceable and prohibited." He attaches his legal reasoning.

[The letter and opinion referred to follows:]

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

April 28, 1989

Mr. T. Louis Austin, Jr.
President
Brown & Root, Inc.
P. O. Box 3
Houston, Texas 77001

Dear Mr. Austin:

The enclosure was sent to all licensees of operating reactors, applicants for operating licenses and holders of construction permits regarding Department of Labor settlements. The information contained in that letter may also be pertinent to your dealings with your employees. There can be no question that public health and safety require that employees be free to raise safety issues to their management or the NRC.

You should examine your current and previous agreements to assure that restrictive clauses are not present. If restrictive clauses are found, you should promptly inform the employee or former employee that the restriction should be disregarded, that he or she may freely come to NRC at any time without fear of any form of retribution, and that such a restriction will not be enforced.

Please notify us no later than July 31, 1989, if any such clauses have been identified. Your response should be provided to the NRC Vendor Inspection Branch.

Sincerely,

Victor Stello, Jr.
Executive Director
for Operations

Enclosure:
Letter to Licensees
re DOL Settlements

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

SUBJECT: NOTIFICATION OF THE NRC OF EMPLOYEES' POTENTIAL SAFETY ISSUES

The purpose of this letter is to reemphasize to licensees their responsibilities to assure that they, and their contractors and subcontractors permit their employees to contact, without restrictions, the NRC with concerns about potential safety issues. In particular, this letter notifies licensees that it is not acceptable to include in settlement agreements for discrimination matters arising under Section 210 of the Energy Reorganization Act of 1974, as amended, or in any labor agreements or other agreement affecting compensation terms, conditions and privileges of employment, any restrictions on employees or former employees providing information to any members of the NRC including the staff, inspectors, investigators, Administrative Law Judges, Boards, or the Commission.

Information Notice 84-08 (February 14, 1984) reminded licensees that the public health and safety requires that employees be free to raise safety issues to licensee management and to the NRC. Failure to permit employees to do so violates 10 CFR 50.7 regarding "Employee Protection" and may subject licensees to significant enforcement action by the NRC.

In addition to NRC action, employees who have been discriminated against for raising safety issues have the right to file complaints with the Department of Labor pursuant to Section 210 of the Energy Reorganization Act of 1974, as amended, for the purpose of remedying the harm caused by the discrimination. Following the filing of a complaint, the Department of Labor performs an investigation. If either the employee or the employer is not satisfied with the outcome of the investigation, a hearing can be held before an Administrative Law Judge with review by the Secretary of Labor.

In many cases, the employee and the employer reach settlement of the issues raised in the DOL proceeding before completion of the formal process and a finding by the Secretary of Labor. NRC supports settlements as they provide remedies to employees without the need for litigation. Settlement agreements in Section 210 proceedings are matters within the jurisdiction of the Department of Labor. Licensees and their contractors must not include clauses in these settlements which in any way restrict the ability of employees to provide

information about potential safety issues to NRC. Examples of restrictive clauses include but are not limited to prohibiting or in any way limiting an employee, or an attorney for such employee, from coming to and providing safety information to an NRC staff member.

Licensees should examine their current and previous agreements to assure that restrictive clauses are not present. If restrictive clauses are found, licensees should promptly inform the employee or former employee that the restriction should be disregarded, that he or she may freely come to NRC at any time without fear of any form of retribution, and that such a restriction will not be enforced.

Please notify us no later than July 31, 1989 if any such restrictive clauses have been identified. Your response should be provided to your licensing contact in headquarters.

This request for information was approved by the Office of Management and Budget under clearance number 3150-0011 which expires December 31, 1989. Comments on burden and duplication may be directed to the Office of Management and Budget, Reports Management Room 3208, New Executive Office Building, Washington, D.C. 20503.

Questions concerning this letter should be directed to the Director of the Office of Enforcement.

Sincerely,

Victor Stello, Jr.
Executive Director
for Operations

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

April 24, 1989

MEMORANDUM FOR: Chairman Zech
Commissioner Roberts
Commissioner Carr
Commissioner Rogers
Commissioner Curtiss

FROM: William C. Parler
General Counsel

SUBJECT: SETTLEMENT AGREEMENTS UNDER SECTION 210 OF THE ENERGY REORGANIZATION ACT OF 1974, AS AMENDED

Section 210 of the Energy Reorganization Act of 1974, as amended, was added as a new section to that Act in 1978 (Public Law 95-601). Section 210 offers certain protection to employees of a Commission licensee, or of a contractor or a subcontractor of a Commission licensee or applicant. The protection afforded is to those who believe they have been fired or discriminated against as a result of the fact that they have testified, given evidence, or brought suit under Section 210 or the Atomic Energy Act. The protection is by the employee's application to the Secretary of Labor for review of his case. The Secretary of Labor can issue an order for the employee to be rehired, or otherwise compensated if the employee's case is justified.

A question has arisen regarding the permissible scope of the provisions of settlement agreements entered into under Section 210. Specifically, the question relates to whether such settlements may impose restrictions upon the freedom of employees or former employees protected by Section 210 to testify or participate in licensing and regulatory proceedings under the Atomic Energy Act of 1954, as amended. It has been strongly argued that such restrictions are void both as a matter of policy and as contrary to Section 210 itself.

I have personally reviewed this matter. I have concluded that a Section 210 settlement agreement which imposes such restrictions is both clearly contrary to the policy objectives of the Atomic Energy Act of 1954, as amended, and the overarching objective of Section 210 of the Energy Reorganization Act of 1974, as amended. Accordingly, for purposes of the Nuclear Regulatory Commission's licensing and regulatory responsibilities, any such provision should be unenforceable and prohibited. The bases for my conclusions are attached.

The agency should promptly publish needed clarifications in this area which are consistent with this position. Responsible staff should be directed promptly to inform the Department of Labor of the Agency's views on settlement agreements containing such provisions. Appropriate arrangements should be made with the Department of Labor to assure that such provisions are not included in any future Section 210 settlement agreements. Staff should also attempt to

identify the extent to which, if at all, prior Section 210 settlement agreements contain such provisions. If any are identified, appropriate steps should be taken to follow-up and remove any continuing uncertainty caused by their possible restrictions on communications about nuclear safety matters.

William C. Parler 4/24

William C. Parler
General Counsel

Attachment:
Analysis

cc w/ attachment:
SECY
EDO
H. Thompson
J. Lieberman
J. Scinto
L. Chandler
Regional Counsel
OCA
Carnahan
J. Fitzgerald
B. Hayes

Legal and Policy Implications of Certain Provisions in Settlement Agreements Under Section 210 of the Energy Reorganization Act of 1974, as amended

BACKGROUND

Section 210 was added as a new section to the Energy Reorganization Act of 1974, as amended, by Section 10 of Public Law 95-601 in 1978 [1]. (It is codified at 42 U.S.C. § 5851).

Section 210 of the Energy Reorganization Act offers protection to employees who believe they have been fired or discriminated against as a result of the fact that they have testified, given evidence, or brought suit under that Act or the Atomic Energy Act. (S. Rep. No. 848, 95th Cong. 2nd Sess. 29 (1978)). [2]

An employee who believes that he has been discriminated against in violation of Section 210 may apply to the Secretary of Labor for review of his case. The Secretary of Labor can issue an order for the employee to be rehired, or otherwise compensated if the employee's case is justified. Under this section, employees and union officials could help assure that employers do not violate requirements of the Atomic Energy Act. S. Rep. No. 848 at 29. See Kansas City Gas and Electric Company v. Brock, 780 F.2d 1505, 1512 (10th Cir. 1985).

Any worker who is called upon to testify or who gives information with respect to an alleged violation of the Atomic Energy Act or a related law by his employer or who files or institutes any proceeding to enforce such law against an employer is protected from discrimination because of such activity.

The section prohibits any firing or discrimination based on the employee's activities specified therein and provides an administrative procedure under which the employee or his representative could seek redress for any violation of its provisions.

1/ The provision originated in the Senate. (S. 2554; S. Rep. No. 95-848, 95th Cong. 2nd Sess., May 15, 1978). It was agreed to in Conference. (H. Conf. Rep. No. 95-1796, 95th Cong., 2nd Sess., October 14, 1978).

2/ According to the legislative history (S. Rep. No. 848, at 29), Section 210 is substantially identical to provisions in the Clean Air Act and the Federal Water Pollution Control Act. The legislative history of these Acts indicates that such provisions were patterned after the National Labor Management Act and a similar provision in Pub. L. 91-173 relating to the health and safety of the Nation's coal miners. See, Kansas Gas and Electric Company v. Brock, 780 F.2d 1505, 1511 (10th Cir. 1985).

The Secretary of Labor investigates such charges and issues findings and a decision which are subject to judicial review.

If the Secretary should find a violation, he would issue orders to abate it, including, where appropriate, the rehiring of the employee to his former position with back pay. Also, the person committing the violation could be assessed the costs incurred by the employee to obtain redress.

The Conference Committee report describes the purposes of Section 210 as follows:

> The Senate bill amended the Energy Reorganization Act of 1974 to provide protection to employees of Commission licensees, applicants, contractors, or subcontractors from discharges or discrimination for taking part or assisting in administrative or legal proceedings of the [Nuclear Regulatory] Commission. H. Rep. No. 1796, 95th Cong., 2nd Sess., 16-17 (1978).

DISCUSSION

From the foregoing, the following conclusions are apparent:

> First, Section 210 is an employee protection statute and it vests jurisdiction over employee discrimination matters in the Secretary of Labor.
>
> Second, the Nuclear Regulatory Commission is the body with the authority and responsibility on nuclear issues. It and the public it serves are the ultimate beneficiaries of Section 210. This is so because its overarching public policy purpose is to assure that employees are in a position, without having to jeopardize their own employment, to help assure that their employers do not violate the requirements of the Atomic Energy Act of 1954, as amended, and if they do, that such violations are disclosed. 3/

3/ See, Brown and Root, Inc. v. Donovan, 747 F.2d 1029, 1034-35 (5th Cir. 1984). A memorandum of understanding exists between the Department of Labor and the Nuclear Regulatory Commission in view of their respective interests and responsibilities under Section 210. (See 47 Fed. Reg. 54585, December 3, 1982). The memorandum recognizes that the Department is to investigate and conduct hearings on employee complaints under Section 210 and can order a violator to abate the violation. The NRC does not have direct authority to provide the employee with a remedy. The Department is to notify NRC of any hearing on the Section 210 complaint. Each agrees to exchange information concerning any particular allegation. Among other things, this would enable technical advice to be

(FOOTNOTE CONTINUED ON NEXT PAGE)

It is manifestly clear to me that any provision in a Section 210 settlement agreement which restricts the freedom of an employee or a former employee who is subject to its provisions, to freely and fully communicate with the Nuclear Regulatory Commission about nuclear safety matters is incompatible with the objectives of that section. Such provisions in a settlement agreement would turn the section on its head by using statutory provisions designed to encourage communications about nuclear safety matters into one which (in the circumstances of the particular settlement agreement containing such provisions) restricts, impedes, or frustrates full and candid disclosures to the Nuclear Regulatory Commission about nuclear safety matters. Accordingly, such provisions should be unenforceable and prohibited to the extent their effect is in direct conflict with the public policy objectives of Section 210 of the Energy Reorganization Act of 1974, as amended.

Having reached this legally-grounded conclusion solely in the context of the objectives of Section 210, there is no need for present purposes to inquire further in this memorandum as to whether the Atomic Energy Act of 1954, as amended, and regulations published thereunder, would be specifically incompatible with such provisions. It is sufficient to note that the Nuclear Regulatory Commission's licensing and regulatory processes depend on complete and forthright disclosures about all nuclear safety matters from its applicants, licensees, contractors, and subcontractors. 1/

.oving from legal to policy considerations, any agreement which restricts any person coming to the NRC with nuclear safety problems or, without prior NRC review and approval, any person's voluntary participation in NRC matters dealing with public health and safety, is certainly contrary to the policies underlying the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, as amended. This is so because any agreement under which any person contracts to withhold safety-significant information or testimony from the Nuclear Regulatory Commission could itself be a threat to safety and therefore jeopardize the execution of the Agency's overall statutory duties. Accordingly, in my judgment, even in the absence of a direct conflict with any statute or regulation, such agreements would be void as contrary to public policy, and should be so treated by the Nuclear Regulatory Commission.

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

given to the Department in the event technical considerations form part of a Section 210 complaint.

Neither Section 210 nor, apparently, the memorandum of understanding call for the NRC to review proposed agreements to settle Section 210 complaints. In view of NRC's licensing and regulatory responsibilities, which could be adversely affected by the terms of the agreement, this is a deficiency which should be corrected promptly.

1/ See 10 CFR §§ 50.7 and 50.9.

Senator BREAUX. Something that seems to kind of summarize it even better than that is a memo to the file from Charles Mullins who is an attorney in the General Counsel's Office, assigned to the Comanche Peak case itself. He points out that courts will not enforce a contract where one party gives consideration for the other party's agreement not to testify in an action, regardless of whether the action is criminal or civil. And he cites some old cases that the court will not enforce the contract to procure absence and/or silence of witnesses. He says further on that point that there is, although the cases are relatively old, there is no reason to think that the law is any different now. Presumably, no one has been stupid enough to try something like this for a long time.

That's the basis of the concern that the committee is looking at, and then we read three agreements that we have copies of. One of them being the Macktal agreement, where he was paid $35,000 and agreed to keep the agreement confidential; where he agreed, among other things that he will not voluntarily appear as a witness, or a party in any such proceedings, even before the NRC. And Mr. Macktal further agrees that if he is served with compulsory process, if subpoenaed, seeking to compel his appearance, that he will immediately notify the undersigned representatives at Brown & Root, the company that's paying him the $35,000, and thereafter take ali reasonable steps, including any such reasonable steps as may be suggested by the representatives of the company, to resist to such compulsory process.

And my question to you is, in light of all the statutes that I read, in light of your general counsel's opinion, in light of Vic Stello's letter to every licensee in the country, in light of all that, including the bribery statutes I might add, how does an agreement like this come out to be, in your opinion, number one, legal, and number two, good public policy?

Mr. ZECH. Well, first of all, let me say as far as the specific agreement, Mr. Chairman, it is before the Department of Labor at the moment. We initially said that we believed that the agreement did not abrogate our regulations, but it became clear to us that it was not a necessary statement in issuing the Order that contained that statement.

In other words, we later decided that it was superfluous for us to make that decision since it was before the Department of Labor. Now, that just means that we have not made a decision as far as the legality is concerned.

Senator BREAUX. You're not going to be able to get away by punting this thing to the Department of Labor. Your own office has sent out an extensive memo saying that this is contrary to public policy——

Mr. ZECH. I'm not going to punt it to anybody, Mr. Chairman, if you'll let me finish, I'd like to finish.

Senator BREAUX. Please.

Mr. ZECH. So, the Commission has decided that this is a very, very difficult decision as regards a policy matter and a legal matter. We do not want anybody to not have an avenue or an opportunity to bring their concerns to the NRC. That is clear, and that's our position.

Senator BREAUX. Why is it a difficult decision? You've got all these statutes saying you can't pay someone to not testify. You've got a contract that gives somebody $35,000 in order to not appear before the NRC and why is that a difficult decision to conclude?

Mr. ZECH. Because there's lots of legal connotations to it, there's lots of policy connotations to it. And the Commission has determined that we should go out with the rulemaking, get public comments, discuss the whole thing, lay it on the table and make a decision.

Senator BREAUX. Let me ask the question. A person on the street that looks at this, says, my God, what are they doing. And you're telling me that we've got legal ramifications. Your own general counsel says it's wrong. Your own enforcement people sent out a letter to every licensee in the country that says it's wrong——

Mr. ZECH. May I finish, Mr. Chairman?

Senator BREAUX. No, let me ask the question. Your own people say that it's not right, the counsel says it's not right, and you're telling me that you've got to go to a rulemaking to determine that it's illegal to pay people money to not testify?

Mr. ZECH. I didn't finish my statement, Mr. Chairman. We are going to a rulemaking, because it's the appropriate thing for this Commission to do.

Now, as regards what you said about the general counsel, and as regards to what you said from the Executive Director for Operations on the generic letter, my personal opinion is that there should be no restrictions, and I agree with what they said 100 percent. But I'm giving you that as my personal opinion. I agree with them. It should be very clear that there should be no restrictions on anybody to bring any safety concerns to the Commission.

On the other hand, that doesn't mean that all the Commissioners would agree with me on that. We should go to rulemaking. We should go to comment period, and we should find out. I agree with those statements 100 percent. There should be no restrictions.

On the other hand, there is concern that if there is an avenue or an opportunity to come to the Commission, and it's clearly stated in those agreements, is that sufficient? That's the thing that we have to be looking at, and looking at very carefully. I agree with those statements, personally. There shouldn't be any restrictions—the thing about this particular case, and not getting into the Department of Labor case any more than I could or should, it's clear, at least it was clear to me, that the Commission was telling Mr. Macktal and others who were interested in this that they could always come to the Commission.

On the other hand, Mr. Macktal obviously had a concern in his mind when he signed that agreement, which we had nothing to do with. But it was unclear in his mind whether that agreement extended to whether he could come to the Commission. That should be clarified. That's why we're going to go to rulemaking to make sure that somebody can come to the Commission with a concern they have at all times. And that should make it very clear. It apparently was not clear to Mr. Macktal, and we respect that. We want every concern that is out there on safety to be brought to the Commission. And that's why we're going to rulemaking.

Senator BREAUX. Okay?

Mr. ZECH. Yes, sir.

Senator BREAUX. Does anybody on the Commission agree that it is appropriate, or feels that it is appropriate for a contractor working in a nuclear powerplant to pay money to an employee or a former employee to not appear or testify before the NRC, or give information to the staff, the investigators, or any other organization or agency of the Federal Government? Is there any doubt that that is not right by anybody?

Mr. ZECH. I don't think there is when you put it in those terms. But the thing we don't know is, and we're not sure is, whether the agreement allegedly was to pay for costs, pay for expenses, pay for concerns that they had about things that had taken place, not necessarily to prevent them from coming to the Commission. That's what we don't know. Now, you're implying it is, and I understand that. I would imply it is, too.

Senator BREAUX. Let me read it back one more time, and any other Commissioners that have any questions on what I'm asking you, I want to hear it.

Further, Mr. Macktal hereby agrees that he will not voluntarily appear as a witness or a party in any such proceedings; and Mr. Macktal further agrees that if served with compulsory process seeking to compel his appearance or joinder in such a proceeding, he will immediately notify the undersigned representatives of Brown & Root, or his successor, in writing and thereafter take all reasonable steps, including any such reasonable steps as may be suggested by the representative of Brown & Root, to resist such compulsory process. He was given $35,000 after he signed this.

Now, my question is, How, please tell me, that this is, number one, at the very least, contrary to your regulations, contrary to the Energy Reorganization Act, contrary to your general counsel's opinion, contrary to the memo of Mr. Stello that every licensee in this country got, how can there be any doubt that this is not right?

Mr. ZECH. Let me answer your question. In my mind, personally, there isn't any doubt. You shouldn't do that. But there is another way to look at it. That agreement declared that he couldn't come before the Licensing Board. That did not prevent him from coming to the Commission, or to the staff. It did not do that. Now, the misunderstanding that is there needs to be clarified, and I agree with that.

Senator BREAUX. Let me interrupt you on that when you say it didn't prevent him from coming to the NRC.

Mr. ZECH. It did not prevent him from coming to the NRC. He still could come to the NRC. We kept telling him that.

Senator BREAUX. How can he come to the NRC if he gets $35,000 and signs an agreement not to voluntarily appear as a witness before any such proceedings, that is, proceedings before the NRC? He signed that. Now, how can you tell me that he would still be able to appear before the NRC after he signs this agreement?

Mr. ZECH. Well, as I say, there are differences of opinion on that. I don't think that there is any question in my mind that in his view he was prevented from coming to the NRC. And I agree that has to be clarified, and it should be clarified. I don't think that was right at all, myself, and I'm giving you my personal opinion on that.

Senator BREAUX. The other agreement that we have is with a Mr. Pelozzi—I don't want to mispronounce his name—where an-

other subcontractor on the nuclear powerplant for the sum of $30,000, got him to sign a confidential agreement wherein he said that he would not voluntarily cooperate with, or testify in any discrimination or wrongful discharge case under the Atomic Energy Act, or the Energy Reorganization Act, and not voluntarily testify or otherwise participate in any licensing or safety proceeding or investigation before the NRC.

Now, is there any doubt that that's contrary to everything we've outlined here?

Mr. ZECH. No. In that particular case, Mr. Chairman, it is my understanding that Mr. Pelozzi has indeed brought forth his safety concerns to the NRC. We've been communicating with him since 1986, I believe. And in fact, as of last month he was still talking to us. So apparently it didn't keep him from bringing his safety concerns to NRC.

Senator BREAUX. Mr. Zech, you're missing the point. If he violates the agreement and then comes into you after he gets the $30,000 that's one thing. I'm glad he did that.

Mr. ZECH. Well, I am, too.

Senator BREAUX. But what I'm talking about is the agreement that apparently the NRC has not ever challenged which he has received $30,000 to not, in fact, testify.

Mr. CURTISS. Mr. Chairman, I think the agreements——

Mr. ZECH. I don't know that we've seen that agreement at all, Mr. Chairman. I'm not sure we have.

Mr. CURTISS. I think that goes to an important point about the agreements. As I read those agreements, they do not foreclose an individual from bringing safety concerns to the attention of the Commission. They prohibit him, voluntarily after he's agreed to do that, not to initiate a request for an adjudicatory hearing, which is one avenue that's available to bring those safety issues to the attention of the Commission.

Senator BREAUX. Mr. Curtiss, do you think that a witness is not going to be intimidated and threatened to be sued after he signs this agreement saying he will not voluntarily appear? Do you think that any individual is going to sneak through the back door to come tell you all something? Or he's going to throw it over the transom to come tell you what's happening?

Mr. CURTISS. No. In fact, I think the parties that entered into that agreement, specifically recognize that the only avenue that's foreclosed is the right to request a hearing. And they have specifically said in the context of the Brown & Root agreement that they have the opportunity to come to the Commission informally to present their safety concerns.

Senator BREAUX. Okay.

Let me ask you what your interpretation is when he says he cannot voluntarily appear as a witness, number one, and if you subpoena him he's got to resist it to the best of his ability, even by telling the company that they have to help him do it. Is that not a restriction on that person's ability to testify and give you valued information?

Mr. CURTISS. Well, I think a point that's worth emphasizing is it's not a restriction on his ability to bring safety information to the attention of the Commission.

Senator BREAUX. How does he do it?

Mr. CURTISS. He calls directly to talk to Tom Murley——

Senator BREAUX. I can't get some of those people on the phone. Are you telling me a person who's a fired worker out in Texas is going to be able to get you on the phone and say, let me tell you what's happening out there?

Mr. CURTISS. Frankly, I think that's the most effective way to do it.

I do think that the most effective way to bring your safety issue to the attention of the Commission is rather than going through an adjudicatory board, contacting the staff or the Commission directly. The point is, that those agreements don't prohibit him from doing that.

Senator BREAUX. Mr. Curtiss, every person except this Commission, that has ever written anything on these agreements is telling me that they're wrong, that they can't believe anybody would be so dumb as to try and write them. Your general counsel says they are illegal. Mr. Stello sends a document under the NRC's heading to every licensee in the country that says it's wrong. And now the Commission members, which should be setting the standard, is divvying about trying to make some fine lines from a legal standpoint. That is so disappointing

Mr. CURTISS. I don't think we've been told that they're illegal.

Senator BREAUX. Do you want me to read back the general counsel's letter?

Mr. CURTISS. I understand what the general counsel said, I don't think we've been told that these violate section 210 at this point.

Senator BREAUX. Let me read it back.

Mr. CURTISS. Okay.

Senator BREAUX. Your general counsel: "A question has arisen regarding the permissible scope of the provisions of settlement agreements entered into under Section 210. . . . I have concluded that a Section 210 settlement agreement which imposes such restrictions is both clearly contrary to the policy objectives of the Atomic Energy Act of 1954, as amended, and the overarching objective of Section 210 of the Energy Reorganization Act of 1974 as amended". He concludes, "Accordingly, for purposes of the Nuclear Regulatory Commission's licensing and regulatory responsibilities, any such provision should be unenforceable and prohibited.

Now how much clearer can it be?

Mr. CURTISS. I think he's saying they're bad as a matter of policy. I don't interpret that to say that they're illegal.

Senator BREAUX. Senator Simpson.

Senator SIMPSON. Well, yes.

You just dribbled that over here and shot that didn't you?

I've come to watch this Chairman work. He doesn't spend time trying to do things for activity and notoriety. I don't see that. But I know he's pursuing this because of a great frustration. A frustration with the Nuclear Regulatory Commission. It doesn't work. It never has worked. It ought to be a single administrator, and the sooner we jettison this operation, before we have a transient in this country—that's that marvelous phrase—and the five of you have to appear for days in a grilling before the American public while everybody is watching. And it will be terrible, just terrible. Terrible

for you as human beings, individuals, who I really care about, especially one who was my chief counsel, who will acquit himself well under any circumstances.

That's what we're talking about. It's bizarre. It's this over-layering crop of lawyers and they're all over the place in the NRC. There are more lawyers than there are people doing the Nation's business about safety. I've said it before. It's not new, it's not dramatic, it's not intended to be that. It's just bizarre.

I think that you can over-think things in life. And that's one of the problems in Washington, there are too many people over-thinking things. Just like in theology, you can over-think things.

I practiced law for 18 years, in real life, real human beings; some in pain, some in anguish, murders, I did it all, criminal activities, divorce, the whole thing. Here we have some poor guy who's a journeyman electrician, who has been engaged by lawyers and ought to be somewhere in this process. This stinks. I think there's some grave deficiencies in these lawyer's conduct. I think there is a crude overreaching, and the next proceeding for those people ought to be a disbarment box somewhere. That's my view about their conduct when I look at it.

And so they strapped together this document and put strictly confidential on it. No wonder they did. The Chairman has read some of it; not call Mr. Macktal as a witness, or join him as a party. We've already heard that phrase, which is repugnant to any lawyer, to resist compulsory process. It's a violation of what we do as lawyers. You tell your clients to respond and they can be there with you, but you don't figure ways to put them in a contract basis to resist. And then it goes on that they will remove, remove from Mr. Macktal's personnel file his three-page memorandum, and his assignment termination sheet. That's page 5 of this "strictly confidential" agreement. And then they will indicate only that Mr. Macktal quit or resigned his position with Brown & Root for personal reasons. And then it goes on to say that it will be sealed. I mean, come on, we would never get away with that in our line of work in this Congress, nor should we, nor should they, nor should this fellow's attorneys.

I'd be interested to see them on the next go around. That's who I'm looking for next. I can't believe what I'm seeing. But if anyone believes, in the real world, that after some poor cat signed all this stuff, that he could pick up the phone, Jim, and call somebody to help him out in the NRC, that strains every bit of common sense that there is in the world. He probably went home at night and said, well, I guess I'm going to get $15,000, meanwhile, my attorneys are going to get $20,000. That's probably what he said when he got home. And I better keep my mouth shut. That's probably what he said when he got home. That's called real life at the dinner table. And then these overreaching chaps getting into the millions in representing the trial lawyers of whatever. I'd be interested to see where that all got spread down and dispersed.

Those are really things that concern me, and the whole thing is the reality of how do you really think it is. And it really is not apparently the way you see it. I think I sense a view, maybe a conflict in the Commission; is there a restriction on a person's right to

appear before an NRC Licensing Board a violation of section 210. You apparently have differing views on that, do you?

Mr. ZECH. Yes, we do.

Senator SIMPSON. What is the break on that?

Mr. ZECH. Well, let me just say, Mr. Simpson, my duty as the Chairman is to represent the Commission views. I've done that as best I can. In this particular case I'm in the minority. That's why I gave you my personal views. I've been very proud of the fact that the Commission has generally supported my views. They don't have to.

You heard from Rancho Seco. They have 3-to-2 votes and we do, too, once in a while. But in this case the Commission majority felt that it was necessary to keep an avenue, or an opportunity open and that was sufficient.

My personal view, which I gave you earlier, was that I felt it was not sufficient. I believe that we should clear the air completely. We are dealing with human beings who don't read all the fine print in everything. And my view is that there should be no restrictions. I agree with the EDO. I agree with the general counsel. And I simply didn't get the support of a majority of the Commission on this issue. So I represented the Commission here today as best I could. I think that we should clarify this completely. I think it's wrong to have any restrictions at all. That's my personal feeling. It's not the position of the majority of the Commission.

Senator SIMPSON. Well, I thank you. Mr. Chairman, I'll conclude; you've been generous.

Senator BREAUX. Sure.

Senator SIMPSON. Doesn't it concern you, each and every one of you as Commission members, with respect to that operation, and the Texas Utility settlement that the parties obviously felt they could best resolve safety issues by going outside of the NRC licensing process? In the settlement agreement the settling of the licensing proceeding is tied directly to the settlement of whistle blower claims. Did the NRC really examine that tie and attempt to access its awesome implications for the licensing process?

And then in respect to the utility's agreement, section B in the joint stipulation, it outlines a process which CASE outlined a process which they will use—and they even get a person to sit in on the operation—that they will use to resolve disputes with Texas Utilities relating to matters which are solely under the NRC's jurisdiction. And then, only after CASE and the utility are unable to agree, is the NRC staff action sought to take place. Moreover, if CASE or the utilities failed to make a submission within a stated period of time, the dispute is then deemed conclusively resolved between the parties without involvement by the NRC staff.

Now, what in the world is that about? That is a circumvention of the NRC and its staff, and everything. And why is that happening, unless something is terribly wrong?

Mr. ZECH. Well, in the first place, most of the concerns that are brought to the NRC are not brought through that process. They're brought through from the licensee, or to the licensee, the NRC monitors and we're completely aware of what's going on. We have a very good system of keeping track of what is going on. Now, when they involve themselves in the licensing process, and come to

certain agreements, not all agreements, I don't believe, are bad. Some agreements can be resolved in good faith in order to get on with business, and they can be resolved to the benefit of all parties.

So as far as agreements, per se, are concerned, I don't think that it would be appropriate to say that we're against them. But we are against agreements when they will prevent or preclude, or make it difficult for safety concerns to come either to the licensee or to the NRC. Agreements are not bad, per se, but agreements that have any stipulations, restrictions, or any implications at all of preventing safety concerns from coming to the NRC, are indeed unacceptable.

Senator SIMPSON. I don't have any further questions now. I've got a lot later.

Senator BREAUX. Thank you very much, Senator Simpson. I think you touched on the points that needed to be touched on very directly.

Let me follow, just for a second, the issue that Senator Simpson has just raised. In essence, what we're talking about is that Texas Utilities agreed to pay workers who had claims against Texas Utilities and all the contractors $5.5 million contingent upon the NRC's approving of that settlement, and tying their payment to a dismissal of the Comanche Peak licensing proceeding, which some of these people had been involved in. The NRC Licensing Board met, and this issue was before the Licensing Board. However, the Licensing Board did not consider the terms of all of these secret settlement agreements, relevant to whether the proceedings should be dismissed or not. And Judge Bloch, B-L-O-C-H——

Mr. ZECH. Bloch.

Senator BREAUX. Bloch?

Mr. ZECH. Yes, sir.

Senator BREAUX [continuing]. Who is the presiding officer on behalf of the NRC is quoted as saying, well, assume they have been bribed, which I don't believe at the present time, but assume that was true, why would it be relevant to your becoming a party to the proceedings? To me that's somebody who's running your Licensing Board down below the Commission, that has before him a $5.5 million settlement to a bunch of former employees that had some complaints. And the settlement agreement essentially says, we're going to give you this money, but you've got to get out of here, and don't come before the Board again. And we're going to give it to you only if the proceedings before the Licensing Board challenging the operation of this plant are dropped. Therefore, they have one heck of an incentive to not pursue any testimony before the Licensing Board.

Now, having set that out as I understand it to have happened, how can that be good public policy? Is what the Licensing Board judge saying, I don't care whether they're bribed or not? I mean, that's a horrible thing to say. I'm trying to help restore the credibility to an industry that I think is solid. It needs to be restored though. Don't you think that the NRC should say it's time to look at these settlement agreements to see what these people are being paid not to do?

Mr. ZECH. Well, I'm not aware of that statement, Mr. Chairman, myself, but I would certainly agree that it would not sound appropriate to me.

Senator BREAUX. The Licensing Board votes to dismiss the licensing proceedings challenging the opening of the plant, and at the same time Texas Utilities paid apparently, $5.5 million of all of these claims. It worked perfectly.

Mr. ZECH. Well, let me just say to the best of my knowledge, the agreement did provide that the agreeing party would and could bring any concerns at all, in spite of that agreement, to the Commission. That was a provision. It also provided that they would be a party to the, I believe it's called the Offsite Review Committee.

Senator BREAUX. Oh, they put them on a committee, sure.

Mr. ZECH. Put them on the committee, so they could bring their concerns directly, with anything they had, to the licensee and to the NRC. And there was that specific provision that that party could come to the NRC directly. I recall that, I believe, in that agreement.

Senator BREAUX. Nope, two different agreements; $4.5 million was paid and part of that payment got the people who were objecting a seat on this board. The $5.5 million was a second payment to a group of employees who were disgruntled. And that $5.5 million payment is what I'm talking about now. And that was contingent on the plant having their licensing proceedings dropped. That's the concern that I have, that people out there were given $5.5 million contingent on you doing something, having the Licensing Board objections being dropped. I would think that would set off antennas among the Nuclear Regulatory Commission members. There were two payments, one for $4.5 million, and another one for $5.5 million.

Mr. ZECH. Well, let me ask the general counsel if he may answer that, Mr. Chairman, if I may.

Mr. PARLER. Mr. Chairman, my name is William Parler, the general counsel. The joint stipulation to dismiss the proceedings, was a joint stipulation agreed to by the parties to the Comanche Peak Operating Licensing Proceeding. And if a party agrees not to proceed with a contested proceeding, that is the party's right, at least as I understand it. And that aspect of the dismissal was before Judge Bloch's Board in the July 13th public prehearing conference.

At that prehearing conference, at transcript page 25257, a representative, I believe of the Intervenor, said essentially the following: No worker is prohibited from raising his concerns in any forum that he seeks. The only thing the workers are being asked to release is their liability claims against the company or their allegations that they were wrongfully discharged.

Senator BREAUX. It is your understanding, though, they were only going to get the $5.5 million divided among all the employees contingent on the Licensing Board proceedings being dismissed, isn't that correct?

Mr. PARLER. I have no understanding on that at all.

Senator BREAUX. It's in the joint stipulation of agreement.

Mr. PARLER. There was a joint stipulation regarding the dismissal of the contested issues.

Senator BREAUX. And does that not include the fact that they would only get paid after the licensing proceedings were dismissed?

Mr. PARLER. Well, on that, Mr. Chairman, I have no knowledge. You'll have to inquire of someone else.

Senator BREAUX. Let me read it to you. I'll get it in a minute.

Assuming what I'm telling you is correct, that they were paid $5.5 million and they were not going to get it until the Licensing Board proceedings were dismissed, what's your opinion of that?

Mr. PARLER. My opinion is that if any party to a contested proceeding decides that it would be in its best interest to settle the proceeding and to have the proceeding dismissed, well that's perfectly okay, provided that the settlement is in accord with law, is not contrary to the public interest, the terms of the settlement agreement are reviewed by the presiding board, there are no strings attached any place which would preclude the Commission from being aware of safety issues, and no strings attached with regard to further participation in some other Commission proceeding.

Senator BREAUX. Well, that last part was kind of a key part, wasn't it? Because, as I clearly understand their agreement, it says that they were to get the $5.5 million when, and only when the licensing procedures before the Licensing Board were dismissed. They were participants before the Licensing Board objecting to the plant. Is it not something that would be contrary to public policy to allow that type of a payment to be made?

Mr. PARLER. I would say that whether a contested proceeding before a licensing board goes on, depends largely upon the position of the person that asked for the hearing in the first place, and whether that person is satisfied after a number of years, in this case I believe around 10, that it would be in that person's best interest, as a party, to settle this proceeding and to proceed otherwise.

Senator BREAUX. Do you agree with what Judge Bloch was quoted as saying?

Mr. PARLER. I do not remember precisely Judge Bloch's quote, but I think that it was in the following context—I don't have the recollection of the precise transcript page. I think it was in the context of a number of late petitions for intervention coming before him and asking that the proceeding not be dismissed, pursuant to the joint stipulation. And as a part of the petitioners' arguments, they were arguing that, look there are these secret agreements, money paid for silence, et cetera, and it was in that context that Judge Bloch said that would not have any bearing on the desires of the parties to the proceeding to have the proceeding terminated.

I've given you the statement made by one of the counsel as to how the workers, or the former workers that had complaints filed, how they would be affected. A similar statement was made by the counsel for the utility later on in the proceeding. So, at least Judge Bloch had those views before him.

Senator BREAUX. Mr. Chairman, in summary, specifically I would like to have you tell the committee what is going to be done—I think you hinted at what was going to be done—what is going to be done about these cash settlement agreements that prohibit, or discourage at the very least, testimony before agencies of the Govern-

ment dealing in nuclear matters? What's going to be done with this problem by the Commission, which I think is extraordinarily serious.

Mr. ZECH. Well, I agree that it's serious, Mr. Chairman. And something has to be done about it. First of all, we have gone out, as I think you pointed out earlier, with a generic letter prepared by the Executive Director for Operations addressed to all of our licensees and to the more significant contract organizations to find out if there are more agreements out there that we're not aware of, that we may not have been a party to. So we're doing that. And the information requested from all of those licensees and others have been asked to come to the NRC by the 31st of July.

Senator BREAUX. Let me interrupt just on that. We would like to get copies of any of these agreements that may be forthcoming as a result of that letter.

Mr. ZECH. Certainly. We'll be pleased to provide them to you.

In addition to that, though, we've asked the general counsel and the Executive Director for Operations to look at the whole matter, both from a legal and policy perspective and come to the Commission with a rulemaking proposal that would clarify this. The Commission will look at this whole situation so that there will not be any doubt that this situation, and no insinuations of possible wrongdoing will be tolerated. We don't intend to tolerate them, Mr. Chairman. And I would hope that's the action that the Commission will take in this matter.

It is a serious matter. We want to clarify it. We must clarify it. And I'm sure the Commission will.

Senator BREAUX. If there are no other questions from my colleague, we'll move to the next panel. I want to thank you, Admiral Zech.

Mr. ROGERS. Mr. Chairman, could I say a few words?

Senator BREAUX. Sure.

Mr. ROGERS. I think there should be no doubt that while there are some differences here on some fine points, certainly I want to make it very clear that there's no doubt in my mind that anyone with a safety concern should have a direct access to the Commission, unimpeded in any way. And I think that—I suspect that my fellow commissioners feel that way as well, regardless of whether there's a small difference in some wording on some of these things.

We absolutely have to have access to any kind of safety information, unimpeded, no question in my mind about that. And there is no big difference in the Commission, I believe, on that issue itself.

Some of the testimony that we heard today here, I think needs a little bit of clarification. I was rather disappointed to hear from Mr. Smeloff that he did not hear what was said to the Board when they appeared before the Commission on April 7th. One of the matters which I expressly put to that Board, because it is a new Board, there are new members on that Board, a new chairman and at least one other new member of that Board, and I put to that Board explicitly the question, and it's in the record transcript of that meeting, whether that Board had reviewed all agreements or commitments of the Board, any prior Board, to the NRC to see that there was continuity of efforts, and continuity of commitments with regard to any safety matters with respect to the NRC. They

had not done that. They promised to do it. I will now, since I heard Mr. Smeloff not refer to that instruction given to the Board by the NRC, see that we do get something from that Board that they have reviewed those matters.

There were a number of points made with the Board. We did not just sit there and listen to them. And there was one that I, myself, made. So I respectfully ask you to explore those matters if you have a concern, about the nature of that meeting of the NRC with the SMUD Board, because we did not just sit and listen to them. We did interrogate them on a number of issues.

Senator BREAUX. Did you specifically raise the economic incentive resolution that they operated under?

Mr. ZECH. I did, Mr. Chairman.

Mr. ROGERS. Yes, the Chairman did, and I want to turn to that, because that's a very important point. The economic incentive resolution, in my view, is a very bad resolution. And should never, something of that nature should never be passed.

I happen to represent the NRC on the National Association of Regulatory Commissioners, and I have made, repeatedly, statements to the committees with which I meet, that any such economic incentive program instituted by any state regulatory body should be very, very carefully reviewed for its safety implications. There are ways of writing them that do not have a severe impact on safety, and there are other ways of writing them that do have a severe impact on safety. I think the SMUD resolution is one of the worst examples of that kind.

Mr. ZECH. Mr. Chairman, may I take one final minute. I know you want to move along.

Senator BREAUX. Sure.

Mr. ZECH. Before I conclude, I think it is important to address the Rancho Seco matter from the Commission's standpoint just very, very briefly.

First of all, I think we've acted responsibly in that matter. I can assure you we're continuing to monitor the Rancho Seco operations very, very carefully. But let me quote to you from the last meeting we had at the Commission when Mr. Smeloff had raised the question of economic incentives. I said this, "Mr. Smeloff, to give you an answer to your specific earlier question, I think I can respond for my colleagues when I say that the Commission has grave concerns about any kind of an initiative or referendum of any kind of a public response that would provide an incentive, if you will, for economics over safety. There's just no question about that. There shouldn't be any question in your mind that that's our feeling. We would oppose any kind of a measure that would indicate that 50 percent, or 60 percent, or any other percent of overall operations should be your goal as it might impact on safety. Safety has got to be first. In our judgment there shouldn't be any question about that."

Thank you, Mr. Chairman.

Senator BREAUX. Was that the unanimous opinion of the Commission?

Mr. ZECH. It was.

Mr. ROGERS. Absolutely.

Mr. ZECH. They all agreed with me at that time.

Senator BREAUX. Okay.

Mr. ZECH. Yes, sir.

Senator BREAUX. Mr. Chairman, we thank you for your appearance.

I want to welcome at this time Mr. Joseph Macktal. Mr. Macktal, we're glad you're here.

[Witness sworn.]

Senator BREAUX. We welcome you, Mr. Macktal, we're glad you're here, and we'd be pleased to receive your testimony. Number one, don't be nervous.

TESTIMONY OF JOSEPH J. MACKTAL, ACCOMPANIED BY STEPHEN KOHN, COUNSEL, MICHAEL KOHN, COUNSEL

Mr. MACKTAL. My name is Joseph James Macktal, Jr.

Senator BREAUX. Let me ask that, for the record you tell us who is with you. Please identify yourselfs.

Mr. STEPHEN KOHN. Yes, I'm Stephen Kohn, attorney for Mr. Macktal.

Senator BREAUX. K-O——

Mr. STEPHEN KOHN. K-O-H-N.

Senator BREAUX. Okay.

Mr. MICHAEL KOHN. I'm Michael Kohn, attorney for Mr. Macktal.

Senator BREAUX. Do you know the other Kohn?

Mr. MICHAEL KOHN. Yes.

Senator BREAUX. Are you brothers?

Mr. STEPHEN KOHN. Yes.

Senator BREAUX. All right, Mr. Macktal.

Mr. MACKTAL. Thank you.

The first statement that I feel compelled to make is to applaud this committee for conducting this investigation.

I was employed by Brown & Root at Comanche Peak site as an electrical foreman. In February 1986, I filed a wrongful discharge complaint against Brown & Root and Texas Utilities. In January 1987, under duress, I entered into a secret settlement agreement which restricted myself and GAP from testifying before the ASLB, and from voluntarily testifying before NRC procedures. In December of 1988, the Commission issued an order and memorandum CLI 88-12 which basically stated that it was legal for utilities to censor people and issues brought before the ASLB.

On April 20, 1989 the Commission retracted that order and implied that they had no jurisdiction. On April 28, 1989 the NRC staff issued a bulletin stating that it was illegal. The NRC's flip-flop on this issue has confused a sophisticated industry and its workers. Yes, it's legal. Maybe it's not. I don't think we have jurisdiction, but don't do it. Obviously the Commission is not captain of its own ship.

On April 14 the committee asked me to provide input and my opinion as to the legality of these secret settlement agreements. In my opinion they are totally and unequivocally illegal. I urge this committee to hold the Commission accountable. I pray this committee will dismantle and restructure the Nuclear Regulatory Commission, and restore credibility to the industry. That's all.

Senator BREAUX. Mr. Kohn, do you all have anything to add at this point?

Mr. STEPHEN KOHN. No, Mr. Senator.

Senator BREAUX. Let me ask you just a couple of questions. My father-in-law was an electrical foreman, and I worked as an electrician when I was in law school. I still have the remnants of lost fingernails from being an electrician, so I admire what you do.

As I understand, you worked for Brown & Root at the plant, for what, about a year?

Mr. MACKTAL. Yes, sir.

Senator BREAUX. And then you quit, or were dismissed, or what?

Mr. MACKTAL. I was constructively discharged. After working at the plant for some time and watching the progress of the plant, I became fearful for the design and the workmanship at the plant.

Senator BREAUX. Let me ask you, after you left employment of the company, didn't you file some allegations? I think there were about 11 or so, alleging that some of the work had not been done properly or safely.

Mr. MACKTAL. Before.

Senator BREAUX. Before you were dismissed?

Mr. MACKTAL. Before I left the company I took those allegations to a Brown & Root general foreman, and an in-house investigative team, known as SAFETEAM. After my discharge I also took some of those allegations to the NRC.

Senator BREAUX. To establish the fact that you, I think, are a legitimate person, and I honestly think that you are, some of those allegations were, in fact, that you made acted on by the Nuclear Regulatory Commission as I remember. Wasn't it about 6 of the 11 or so allegations that you made that the Nuclear Regulatory Commission felt were serious enough and had merit to the point that they took action, or issued some new rule or regulation that had to be followed as a result of your allegation?

Mr. MACKTAL. Contrary to the findings of SAFETEAM—SAFETEAM found nothing wrong with the allegations. Of the 11 allegations that I did take before the NRC, it is my understanding that they found serious violations and substantiated six of them. The others they could not—they did not substantiate, but they could not find any evidence that it wasn't happening.

Senator BREAUX. Let me ask you, the safety board that you talked about was an in-house board that you first went to?

Mr. MACKTAL. Yes, Senator. That is the in-house—the in-house board now that is in place in the $4.5 million July settlement.

Senator BREAUX. Apparently sometimes before the Nuclear Regulatory Commission got your allegations and acted on them, before that happened, you entered into the settlement agreement with Brown & Root, can you describe what the settlement agreement, as far as your understanding, required you to do, or what did you get as a result of it?

Mr. MACKTAL. It was my understanding from just simply reading the settlement agreement that I basically could not talk to anybody about my activities at Comanche Peak. I was barred from going before the ASLB. I was barred from voluntary testifying before any proceeding with the staff. I was also barred from being called as a witness in other DOL proceedings.

I felt that I could not talk to anybody, and when the Capton wiring revelation started to come about I was sitting there knowing that I had knowledge of Capton wiring in the nuclear power plant, and I couldn't say anything to it.

Senator BREAUX. Let me ask you this, when you had that settlement agreement was presented to you did any of the lawyers that presented it to you point out to you that while you couldn't voluntarily testify, or if you were subpoenaed you had to resist, did any explain to you that they felt that you could still maybe make a phone call to one of the staff members of the NRC and express your concerns to them?

Mr. MACKTAL. Absolutely not.

Senator BREAUX. Did you ever feel that you would be in a position to be able to do that, or did you feel that the agreement really prevented you from, like you say, talking to anybody?

Mr. MACKTAL. The agreement prevented me from talking to anybody.

Senator BREAUX. Did they, in fact, pay you the $35,000, was it, after you signed the agreement?

Mr. MACKTAL. I'd like to caucus with my attorney on this for a second.

Senator BREAUX. Sure. It's not a trick question, I was just saying did you ever receive the money that the agreement, on its face, points out that was part of the agreement?

Mr. MACKTAL. The $35,000, it was my understanding it was—I got a personal check from an attorney for $15,000.

Senator BREAUX. For $15,000?

Mr. MACKTAL. Yes, sir.

Senator BREAUX. Do you know what happened to the remaining money, the $20,000 balance that was mentioned in the agreement that you signed?

Mr. MACKTAL. In retrospect, I had looked at some documents that had been turned over in other litigation and have an accounting for some of the money. I don't have a full accounting of the $35,000.

Senator BREAUX. To your knowledge, what happened to the remaining money?

Mr. MACKTAL. It went to GAP.

Senator BREAUX. Government——

Mr. MACKTAL. GAP, Government Accountability Project.

Senator BREAUX. Is that a group of who, attorneys, consultants, or what, do you know?

Mr. MACKTAL. It's an organization which represented whistle blowers, and they were also representing CASE, the intervention group at Comanche Peak.

Senator BREAUX. Had they represented you at some point?

Mr. MACKTAL. Yes, sir. They were representing the intervenor and the whistle blowers at the same time.

Senator BREAUX. Okay.

Senator Simpson, any questions?

Senator SIMPSON. Mr. Macktal, it's nice to see you this morning. You've been kind of through the jumps, haven't you?

Mr. MACKTAL. A little bit.

Senator SIMPSON. When did all that start? That was a long time ago when you decided to come forward with whatever you had to come forward with, wasn't it?

Mr. MACKTAL. It was July 1985.

Senator SIMPSON. Did you seek out these attorneys, these first attorneys that represented you?

Mr. MACKTAL. When I was discharged from Comanche Peak, I went to the intervention group, CASE, and sought out their help and they put me in touch with the attorneys.

Senator SIMPSON. Then the attorneys contacted you after you sought help from this organization?

Mr. MACKTAL. Yes, Senator.

Senator SIMPSON. After you met with the organization, they said, we can get you an attorney, and then the attorneys contacted you?

Mr. MACKTAL. Then the attorney called me.

Senator SIMPSON. They called you?

Mr. MACKTAL. Yes, Senator.

Senator SIMPSON. To do work for you?

Mr. MACKTAL. Well, we discussed my case—we discussed what happened——

Senator SIMPSON. But they called you?

Mr. MACKTAL. Yes. I was at the intervenor's office when that phone call took place. The intervenor called and then I believe the attorney called back. It could have been that the attorney then just—you know, the intervenor just passed the phone from her to me. But I did not physically make the phone call, if that's what you're asking for, Senator.

Senator SIMPSON. But the attorneys contacted you and said they would help you, apparently, is that right?

Mr. MACKTAL. Yes, Senator.

Senator SIMPSON. And then they got into the case and you made this settlement. You've told the Chairman that you felt you couldn't have talked to anyone because of what you signed, that you never would have thought you could ever have called the NRC or anybody, that it just wouldn't have been appropriate. Or that you couldn't have done it under what you signed?

Mr. MACKTAL. That was my interpretation of what I signed.

Senator SIMPSON. I would think that would be, in reading it.

So what was the role of your attorneys? You had a lawyer and now you say what they did for you was illegal.

Mr. MACKTAL. That is my belief, yes.

Senator SIMPSON. Why do you say that?

Mr. MACKTAL. Because it was illegal and I did not want to enter into that settlement agreement. And that is evidenced by material that we have turned over to this committee.

Senator SIMPSON. And did the attorneys brow beat you and put it to you, and say here's what you're going to do? You said you were under duress, what did that mean?

Mr. MACKTAL. Yes, Senator, they did brow beat me.

Senator SIMPSON. What did they do?

Mr. MACKTAL. If the Senator—I'd like to look at a document here for a second.

Senator SIMPSON. I don't want to take it further than where you are in your present activities, since there was litigation here and

obvious conflict and issues pending before the Department of Labor. We'll just let that all get resolved out in the long call somewhere.

So, let me ask you this. Do you still have safety concerns which you've not brought to the attention of the NRC?

Mr. MACKTAL. Yes, sir. The NRC was fully aware that I had additional safety concerns as far back as July of 1986. I have verifiable phone conversations with the NRC, which they admit that they knew I had additional safety concerns. And until an appeal was filed on their memorandum and order, they neglected them. They just never even pursued them.

Senator SIMPSON. Do you remember who you talked to?

Mr. MACKTAL. It was a staff—it was the staff person in Region IV, and the verifiable phone conversation they do identify themselves and at the present time I just can't recall.

Senator SIMPSON. Okay.

But do you have any memo of that, maybe, you wrote down, this day I talked to this person, or this was who I talked to in Region IV, do you have anything like that? I don't mean now, I just asked?

Mr. MACKTAL. I have submitted evidence to the committee. I just don't have the name at the top of my head.

Senator SIMPSON. Yes, okay.

I heard the NRC officials say that they had been trying to talk to you, and that I think you were referring those people to your attorneys. Isn't that correct?

Mr. MACKTAL. Yes, Senator.

Senator SIMPSON. That's happening right now, isn't it?

Mr. MACKTAL. Yes, Senator.

Senator SIMPSON. Not right at this minute. I don't know what's happening right now, but something, yes.

Mr. MACKTAL. The Senator must realize that I am in litigation with the NRC at the present time.

Senator SIMPSON. I do. And so you have some safety concerns and you are litigation. I understand that.

Let me ask you a final question. You know, you settled for a pauper's pittance, it looks like to me. You took $15,000, the attorneys took $20,000, and then they went on to greater things. A CASE representative went on the Comanche Peak Operations Review Committee. This was all in exchange for a dismissal of the licensing hearing. That had never happened before in the NRC. You don't have to answer these questions. This is what happened. It never happened before. A lot of activity, but while other NRC licensing proceedings had been partially settled, this is the first time, at least to my knowledge—somebody can refresh me—that a licensing hearing has been completely dismissed, based upon a settlement agreement involving substantial—and that was a word you were never supposed to use in one of these agreements, believe it or not.

Mr. MACKTAL. That's correct.

Senator SIMPSON. It said in there you were never to use big, or substantial, or anything when describing the settlement. Interesting stuff.

This is the first time, as I say, where it's been completely dismissed on a settlement agreement between the intervenor and the utility. And you must have been a little stunned when CASE did

all this good work, and the attorneys there received a payment of $4.5 million which went to CASE for reimbursement of costs, expenses, attorneys' fees, consultants' fees, salaries, et cetera. And we'll want to find out what that is. And then there would be a "good faith" effort on the part of Texas Utilities to settle whistle blower disputes, though no monetary figure is mentioned in the settlement agreement, there is a $5.5 million limit on their liability to settle the whistle blowers claims.

But you must have feel aggrieved when saw those sums going about. Did you feel a little pang there?

Mr. MACKTAL. No, Senator. Money was not the issue. I never did consider——

Senator SIMPSON. I'm not trying to indicate—I'm just saying I would have been aggrieved if I had seen that. Let's put it that way.

Mr. MACKTAL. Well, I'm sure that at that time I really didn't know, you know, what the $5.5 million was for, or the $4.5 million. At that time the only information I had was that CASE had settled and it was no longer going to be an intervenor, and they had settled for $10 million. I didn't know that——

Senator SIMPSON. Was that $10 million?

Mr. MACKTAL. Yes, $10 million, the $5.5 plus the $4.5.

Senator SIMPSON. Total, okay.

Counsel with your attorney, I think you're not in litigation with the NRC. That's not what you're saying. You said something a moment ago about being in litigation. But it's not with the NRC?

Mr. MACKTAL. I have filed an appeal to their ruling in the District Court of Appeals. And we are litigating that appeal and there are negotiations going on over confidentiality, breaking confidentiality and those type things. I want to testify and bring these safety concerns before a credible body of the nuclear regulatory commission.

Senator SIMPSON. Okay.

But I thought the only litigation that I knew of was with Brown & Root, before the Department of Labor.

Mr. MACKTAL. No.

Senator SIMPSON. And your counsel can answer.

Mr. STEPHEN KOHN. Mr. Senator, Mr. Macktal filed an appeal of the December 21 NRC order to the U.S. Court of Appeals for the District of Columbia Circuit, and we've also petitioned for intervention before the U.S. Court of Appeals for the Fifth Circuit on the December 21 order. And those matters are presently in litigation. The NRC also unilaterally revoked Mr. Macktal's confidentiality in and around September, 1988, and we're considering litigation on those matters also.

Senator SIMPSON. Okay.

Thank you, Mr. Chairman.

Senator BREAUX. Let me ask just one other question. Do you know of any other workers, Mr. Macktal, that may have signed similar agreements with regard to Comanche Peak, similar to yours?

Mr. MACKTAL. I don't have any direct knowledge, Senator.

Senator BREAUX. Is it my understanding that you would like to be able to be in a position to present additional information to the NRC about the safety concerns at the plant?

Mr. MACKTAL. I am hesitant and reluctant to bring any safety allegations to the staff of the NRC.

Senator BREAUX. Because of the agreement?

Mr. MACKTAL. Because of their incompetency. I feel that the Region IV has a history of whitewashing safety allegations at the Comanche Peak site.

Senator BREAUX. What about sharing your information with the Nuclear Regulatory Commission here in Washington. Do you feel that you're able to do that now?

Mr. MACKTAL. Yes, sir, I do. My ultimate goal was to bring those safety concerns before an impartial body, such as the Licensing Board. I was promised that my concerns would go before the Licensing Board, and that is evidenced by a verifiable phone conversation that took place between myself and Juanita Ellis, the Director of the intervenor group, CASE.

Senator BREAUX. Senator Simpson may want to just hear this last question. For the purposes of our record here, with regard to your comments about the conditions under which you signed your settlement agreement, whereas you mention on the record, duress, and some other things, is it your opinion—and you can get the advice from your counsel—that you, by doing that, are in fact waiving your attorney/client privileges with your original attorneys on that issue?

Mr. MACKTAL. No, sir. No, Senator. I unequivocally have tried in every way that I can not to waive the attorney/client privilege that my former attorneys are under.

Senator BREAUX. Okay.

I thank you, Mr. Macktal. I know it has not been easy or very pleasant coming before this Committee. I know it's not something you do on a regular basis. We thank you for participating. I think your testimony has been extremely helpful. This panel is excused.

Mr. MACKTAL. Thank you.

Senator BREAUX. As I stated at the beginning of the hearing this morning, the committee would be able to sit until 12:00 noon. It's 12:02, approximately. We have three very important witnesses that still have to be heard, Mr. Louis Austin, Ms. Billie Garde, and Mr. Michael Spence. As we announced at the beginning of the hearing, we will be in recess until 1:30, and will promptly take these three remaining witnesses.

The committee will stand in recess.

[Whereupon, at 12:02 p.m., the subcommittee recessed, to reconvene at 1:30 p.m., this same day.]

AFTERNOON SESSION

Senator BREAUX. The subcommittee will please come to order. My colleague, Senator Simpson, is on his way and should be with us shortly.

I welcome our witnesses for this afternoon, Mr. Louis Austin, who is president of Brown & Root. Mr. Austin, are these your colleagues?

Mr. AUSTIN. Yes, sir.

Senator BREAUX. Let me go ahead and since we've sworn in the witnesses whose information we subpoenaed, we want to do the same with Mr. Austin.

[Witness sworn.]

Senator BREAUX. I want to welcome Mr. Austin; would you identify your colleagues, just for the record, Mr. Austin?

Mr. AUSTIN. This is Mark Augenblick, on my immediate right, and Pat Hickey next, with Shaw, Pittman law firm.

Senator BREAUX. Okay.

We welcome you before the committee. I have a great deal of experience with Brown & Root. I know they are a very reputable company. They do a lot of work in my State. We've been very pleased with it over the years, and we look forward to hearing Mr. Austin's testimony. Thank you.

STATEMENT OF T. LOUIS AUSTIN, JR., PRESIDENT, BROWN & ROOT, ACCOMPANIED BY MARK AUGENBLICK, COUNSEL; AND J. PATRICK HICKEY, SHAW, PITTMAN, POTTS & TROWBRIDGE

Mr. AUSTIN. Thank you, Mr. Chairman.

For the record, I'm Louis Austin, Chairman of Brown & Root. Brown & Root is one of the contractors at Comanche Peak. You've got my testimony for the record, so if it's all right with you, I'll just summarize and make it brief.

You asked me to address two questions here in this hearing. And one was, are agreements like this legal? And I'm not a lawyer, but in spite of all that was said this morning, I'm told that they are. There are two sides to all questions.

And the second question, is this good public policy? And I agree with Admiral Zech, that settling cases out of court in ordinary proceedings are good public policy, but they should not restrict anybody from going with health and safety matters, whether it's to the NRC or to any other regulatory agency.

I hope your hearing will clear up this, and I think it's already helping some. So I appreciate this.

But may I briefly state to you what has been going on at the site of Comanche Peak before anything ever happens to talk about an agreement like this. Brown & Root has had as many as 5,000 people on the Comanche Peak site at one time. So it means that as one phase of the work built up and another phase of the work went down, we probably hired and terminated somewhere between 10,000 and 15,000 people. And I think our overall record is pretty good on safety and the number of unhappy people, and all.

But I'd like to emphasize that Brown & Root has always had an open door policy, and we still have one. And we've emphasized it on the site more than anything else. I might say, Senator, if you call my office and no one is in there, for 40 years I've been answering my own phone, and people do call me, from different sites, and get action.

Also it's been referred to that at the site the owner set up SAFETEAM, which was an entity on the site which anyone could go to anonymously and confidentially and state any of their concerns and this SAFETEAM did not report to the site management. Also, for several years we've had exit interviews, offered exit interviews

to everyone that left the site. And in these interviews the people were asked whether they had any safety concerns or not. And some people took advantage of that and some people didn't.

I'd also like to read briefly from a letter that I personally sent to everybody on the site back in July 1985, praising them for the work they'd done and all. To the Brown & Root people I said, number one, it is your responsibility to report any safety or quality concern which you discover. The responsibility for reporting safety concerns does not rest solely with quality control personnel. It is a duty that each of you share in insuring the safe operation of Comanche Peak. Number two, if you report a safety concern and do not receive a reply to that concern within a reasonable time, do not hesitate to use one of the several other avenues that are available to you. And that's an open door policy through other avenues. Three, feel free to report any of these concerns, either to your supervisor or to quality control, to SAFETEAM, or to the NRC. And number four, anyone interfering with your obligation to take the action described above will be violating Brown & Root policy and will be subject to severe disciplinary action.

So, we've tried to have an open enough policy up there that everybody felt free to voice any concerns that they have and we've tried to discipline that so that it really works. And, so that's my summary of my testimony, and I'll answer any questions you might have.

[The letter referred to follows:]

Brown & Root, Inc.
A Halliburton Company

Post Office Box Three, Houston, Texas 77001

T. Louis Austin, Jr.
President

(713) 676-3431

July 11, 1985

Dear Comanche Peak Brownbuilder:

Over the history of our company, "Brownbilt" has come to mean quality in construction and "doing it right the first time." In building this reputation, we have relied upon craft to be the first line of quality in the construction process. It has recently come to my attention that several of you have expressed the belief that it is not your duty to report safety concerns and that you might believe you would regret it if you did. This is certainly not the case. As you know, we have made many efforts over the past several years to provide the means by which all employees working at Comanche Peak could freely report any concerns they may have concerning quality matters and can do so without fear that their job would be adversely affected. I want to re-emphasize to each of you the following:

1. It is your responsibility to report any safety or quality concern which you discover. The responsibility for reporting safety concerns does not rest solely with quality control personnel. It is a duty that each of you share in insuring the safe operation of Comanche Peak.

2. If you report a safety concern and do not receive a reply to that concern within a reasonable time, do not hesitate to use one of the several other avenues that are available to you. If your supervisor does not take your concern seriously, then go to his or her supervisor or manager. If for some reason you have a problem with reporting a concern, take that concern higher up the chain of command if necessary.

3. Feel free to report any of these concerns either to your supervisor, or to QC, to Safeteam, or to the NRC.

4. Anyone interfering with your obligation to take the action described above will be violating Brown & Root policy and will be subject to severe disciplinary action. In this connection, each employee is reminded of the policy letter on harassment dated December 20, 1983, directed to all site personnel at Comanche Peak. Should anyone attempt to interfere with your reporting of safety concerns, such conduct requires immediate attention and should likewise be reported.

You are doing a good job in building this plant. The success of this project is important to all of us. I encourage you to continue to have pride in the good work that you have done, and I ask that each of you support fully the policies re-emphasized by this letter.

Sincerely yours,

T. L. Austin

Senator BREAUX. Thank you very much, Mr. Austin. When we ask any questions, please feel free to have your attorneys involved in the response.

I agree with your earlier statement with regard to settlements. I think settlements are, in a generic nature, in the interests of the public process whereby matters are brought to a conclusion sooner rather than later. I think, generally, accepted good public policy.

Let me ask you and your attorneys whether you are familiar with section 210 of the Energy Reorganization Act and the NRC regulations, and the letter from Vic Stello dated, I think, April 28, 1989, which dealt with the question of settlement agreements, and what would be allowed and what is prohibited.

Mr. AUSTIN. In general I'm familiar. Unfortunately, there's so many regulations and so many statutes, and so many laws, I really don't know in detail.

Senator BREAUX. Well, let me ask you this question. If you are familiar with those statutes, what is the general understanding that you receive from reading them. What did they tell you?

Mr. AUSTIN. Well, they tell me that the policy seems to be changing from what it was—well, excuse me.

Everybody wants to clarify this policy, and we in Brown & Root, for one, hope it will be clarified.

Senator BREAUX. But while it's being clarified, there are existing statutes and regulations. One is the Energy Reorganization Act, section 210. One is the existing NRC regulations. And third, is the latest expression in the April the 28th, 1989 letter from the NRC to all licensees, which states a position or a policy. What I'm asking you, what is your company's understanding of what is the existing policy as spelled out by those three areas or three sets of regulations and statutes that I just spelled out?

Mr. AUSTIN. Could I ask Mr. Augenblick to answer that?

Senator BREAUX. Sure.

Mr. AUGENBLICK. Good afternoon, Senator.

Brown & Root's understanding is that they may enter into a settlement agreement and may do so, and perhaps I could quote from the NRC's ruling of December 1988, "as long as the individual's right to bring matters to the NRC in a reasonably convenient manner is not curtailed, we do not see a violation of Federal law or NRC regulation."

Senator BREAUX. And you were quoting, just for the record, from what document?

Mr. AUGENBLICK. I'm citing you to the December 21, 1988 memorandum and order of the Nuclear Regulatory Commission at page 10.

Senator BREAUX. So these agreements were entered into prior to the time that this ruling, that you just quoted from, was made public, or even written for that matter?

Mr. AUGENBLICK. That is correct, Senator.

Senator BREAUX. Okay.

So, when you entered into these agreements, what you had in front of you was not this decision. What you had in front of you at that time was section 210 of the Energy Reorganization Act and the NRC regulations dealing with settlement agreements. You also had a set of public bribery statutes sitting out there.

So what was your interpretation when you entered into the settlement agreements? I presume that you, as an attorney, were involved in the drafting of that document. What was your impression of what was the governing law at that time? Because at that time this ruling from the NRC did not exist. What existed was NRC regulation, and what existed was section 210 of the Energy Reorganization Act. So when you sat down and prepared the document, what was your understanding of what the current law was dealing with settlement agreements?

Mr. AUGENBLICK. Let me clarify one point, Senator. I was not at all involved in the drafting or negotiation of the agreement, to which I think you're referring.

Let me then add that we believe, and we have gone back and reviewed the applicable law, that at the time that agreement was entered, it was consistent with all of the laws and regulations which you refer to. The problem that we find ourselves in, in testifying before you, and in making legal arguments and in having Mr. Austin opine on these matters, is they are currently before two tribunals and the question of the legality of the settlement agreements has been fully briefed, argued. And perhaps one way to more completely answer your question is that we would be happy to forward to you the legal briefs which have been filed on this very issue.

Senator BREAUX. I'm just asking you a general question. As a lawyer representing a company that deals with the Nuclear Regulatory Commission, and nuclear licensing, and has to advise them on settlement agreements, what is your interpretation of what section 210 and what nuclear regulations say with regard to settlement agreements. What does that tell you you can do and you cannot do?

Mr. AUGENBLICK. It tells me that the agreements that we're talking about, and the one that was discussed at such length this morning, while not free from ambiguity, is perfectly consistent with section 210, the anti-bribery statute, and the other statute that you referred to.

Senator BREAUX. Okay.

The agreement that Mr. Macktal talked about, and was signed by the company that you now represent, Brown & Root, Mr. Austin is president, and signed by Mr. Macktal, says Mr. Macktal hereby agrees that he will not voluntarily appear as a witness or a party in any such proceeding, and Mr. Macktal further agrees that if served with compulsory process seeking to compel his appearance or a joinder in such a proceeding, he will immediately notify the undersigned representatives of Brown & Root, or his successor, in writing, and thereafter take all reasonable steps, including any such reasonable steps as may be suggested by the representatives of Brown & Root, to resist such compulsory process. Now that was signed and Brown & Root paid Mr. Macktal, and his attorney, I guess, a total of $35,000 to sign that agreement.

What was the purpose of that agreement? What was Brown & Root trying to get Mr. Macktal not to do in return for getting $35,000?

Mr. AUGENBLICK. Senator, with all due respect, and I'm counseled by my client that lawyers are to be seen and not heard, that

is a matter of the attorney/client privilege. That is a matter which is currently at the core of several different legal proceedings, and we would strongly prefer not to answer that at this stage. We have answered, for the record, and we would be pleased to submit that filing with this committee. We would be pleased to meet with the staff of this committee, but we frankly and candidly do not think it is appropriate to get into that here. I say that with all due respect.

Senator BREAUX. Let me ask Mr. Austin, who is apparently the client. Mr. Austin, what, on behalf of Brown & Root, was the company attempting to accomplish by the contract that you were willing to pay $35,000 to get signed? What was the generic, general thing you were trying to accomplish?

Mr. AUSTIN. I felt that that was within the law, and I felt that anybody that had an agreement like that still had access to the NRC staff. I realize what Senator Simpson said this morning. Mr. Macktal is a nice gentleman, and he would have a hard time understanding that, and I think the whole thing ought to be cleared up. But at the time this was done, I felt that that was what it said.

Senator BREAUX. Well, I'll just mention for the heck of it, I think you got bad legal advice. These attorneys apparently were not involved in drafting it, as you've said for the record. I guess my general question is, why would the company feel it was necessary to go to a former employee, and say we want you to sign this and here's what we want you not to do. I guess what I'm trying to find out is, what were you trying to get them not to do?

Mr. AUSTIN. You don't know how much I want to answer that, but please let me answer it where it's in litigation first, and then I'll explain the whole thing to you.

Senator BREAUX. When you talk about litigation; where do you have litigation pending on the Macktal contract?

Mr. AUSTIN. Before the NRC.

Senator BREAUX. Counsel can respond if it's a technical thing.

Mr. AUGENBLICK. Before the NRC on our appeal, and before the Department of Labor.

Senator BREAUX. Okay.

Well, then let's not talk about the specifics, and I thought I was trying to get it as generically proper as I can. Brown & Root has a contract that was trying to accomplish something. Now, disregarding the question of whether what you were trying to accomplish was legal or illegal, let's put that aside. I'm just trying to find out in your terms, what were you trying to accomplish by the contract? Is that an unfair question? What were you willing to pay $35,000 to get someone not to do?

That's what I'm trying to understand. What did you mean by this? Because some people interpret this as meaning you're preventing the employee from giving information to the NRC. That's it in a nutshell, and that you were paying for him to do that. And I believe that there is statute after statute that says you can't do that. And yet, you probably say, well, that's not what I was trying to do. So, I'm trying to find out what were you trying to do?

Mr. AUGENBLICK. As Mr. Austin said, and it is a very difficult position to be in, because—and I'm not being facetious—Mr. Austin does have strong views about the role of lawyers, but we have, with all due respect to the Senator, advised Mr. Austin not to address

that issue because the intent of the parties is the core issue on appeal in two separate proceedings. And anything that he says here, it becomes a situation where you are litigating your case in several different forums. For all the reasons that you can't litigate your case to the newspapers, we have a serious problem with responding to that. It's not that Mr. Austin would not like to, it's that for reasons having nothing to do with what he would like to do, we just simply cannot, as a matter of law, and as a matter of ethics.

Senator BREAUX. Can you tell me what would be accomplished by this contract from your perspective?

Mr. AUSTIN. Senator, I've got a lot of respect for you and I've got a lot of respect for Senator Simpson. I've testified before him before, but if you'll go back to Senator Simpson's statement this morning that this whole process is filled with legalities and lawyers and all, and if you'll simplify it and all, all of your concerns and all of my concerns will go away. But when you have a process like that, any contract that speeds up that process and does not keep someone from going to the NRC is an advantage to not only companies but finally to the customers that have to pay for any increase in costs.

Senator BREAUX. There's no question, Mr. Austin, that I agree with that. And I've said that, that settlement is in the interest of the public process. But you cannot agree through a settlement, or by a contract, to do something that is legally prohibited to be done. And that is as clear as us sitting here is. You just cannot contract to do something that is legally prohibited to be done. Our question here is, did the contracts entered into by Brown & Root, and the Macktal incident specifically, is that not, in fact, contrary to public policy, number one, and in fact contrary to a number of existing statutes which say you cannot prohibit an employee, or former employee from testifying before the NRC or any other agency of the Government?

When I read the agreement, on its face, it sounds to me very clearly that that is in fact agreeing to do something that is illegal. That is the opinion, as we found this morning, of the general counsel of the NRC and some of the staff of the NRC.

Let me ask you this. Is there anything that you would envision that Mr. Macktal or any employee would be able to do, practically speaking, after signing that type of contract in order to communicate his concerns? And I'm not sure his concerns were right or wrong. We saw that some of them apparently were. We can have an employee, and it's not Mr. Macktal, but take an employee that is off-the-wall, completely wrong on everything that he believes, but I would submit that we could not pay him to not express his concerns before an appropriate committee.

So I guess my question then, to get back to that, what do you think Mr. Macktal would be able to do after he would sign a contract such as this, if anything?

Mr. AUSTIN. To go to the NRC staff.

Senator BREAUX. And that's what he's being hung on, I guess.

Mr. AUSTIN. I beg your pardon?

Senator BREAUX. What I'm saying is that's the same thing that one of the commissioners said. Well, he could make a phone call to

a staff person. But he would be clearly prohibited from voluntarily testifying before the NRC or if he were subpoenaed that he would have to consult with you and resist it with all due diligence, is that what you understand the contract to be, Mr. Austin, or your attorney?

Mr. AUSTIN. That's what we understand. As I said, about is this good public policy, I think it ought to be clarified, and you're in the process of clarifying it, but I'm still told whether it's right or wrong that will be decided in some litigation that this was in accordance with the law at that time.

Senator BREAUX. I'm going to have to ask my final question. Is there any other similar contracts with Brown & Root, or any of your subcontractors, that you may be aware of dealing with employees or former employees restricting their ability to voluntarily testify before any agency of the Government?

Mr. AUSTIN. I'm told that we do not have any other like this.

Senator BREAUX. When you say, and I don't want to be too technical, but when you say like this, are there similar agreements that may have different phraseologies or different amounts involved, or are there just no agreements that would restrict in any way, for any amount the ability of a former employee to testify?

Mr. AUSTIN. I'm told we don't have any others.

Senator BREAUX. Senator Simpson.

Senator SIMPSON. Thank you, Mr. Chairman.

Well, I understand then that it's the position of Brown & Root that, and say if I'm wrong, that settlement agreements which restrict an employee's access to an NRC Licensing Board is acceptable because such an agreement does not limit the employee's access to the NRC staff? Is that kind of what you're saying?

Mr. AUSTIN. Yes.

Senator SIMPSON. And then it is your feeling that, of course, that these employees who agree to these type of settlements fully understand that they can still talk to the NRC staff regarding any safety concerns they might have? That's your understanding?

Mr. AUSTIN. I didn't say that, Senator. In fact, I quoted you that——

Senator SIMPSON. I know, I heard that.

Mr. AUSTIN [continuing]. I think it's stretching. Mr. Macktal is a nice gentleman, and all, but I agree with you and I think it ought to be straightened out.

Senator SIMPSON. Okay.

But I think that the company feels that those persons who enter this kind of an agreement at least should know that they can always go to the NRC staff. And I say from my standpoint as a person who practiced law, and thank heaven went out and did that before I came here, that that's unreal in the public acceptance of real life, especially this gentleman who spoke this morning. That he just felt he was totally locked in. He couldn't do anything. I mean, he signed this thing, he knew what he signed and it said you won't do this, you won't do that. And you have to look at that document to really understand how restrictive and really secretive it is. It was marked strictly confidential. It isn't even signed by him. It's signed by his attorneys, or at least two people who allege to represent him. They signed for him. We'll have one here, we can ask

those questions. But words like—well, you've heard them this morning. I won't go into them. Resisting compulsory process, will remove the personnel file—I've done that—will be sealed, objections, confidentiality, rights to bring action.

But I guess, this is the question for me. If under that agreement, and anyone can answer it, if under this agreement all these people went through all this exercise to get to for reasons that will come out, maybe not here—but they're sure going to come out, that's for sure, that's the good part about this remarkable system of ours—if the employee, then, is still able to talk to the NRC staff and then does so, and then is subpoenaed by the NRC staff to testify at a licensing hearing, what has the settlement agreement bought?

Mr. AUSTIN. Senator, I've already said, I think it ought to all be straightened out. And you——

Senator SIMPSON. I know, but what did it do if they can go to the NRC staff, which everybody is saying in such a marvelous way, that oh, don't worry, this is just a little hunk of trash here, they can always go to the NRC staff. And so, let's say that this guy did, and then they get all excited up there. They like to do this kind of stuff. They're waiting for people. They hang around. They've got a staff that has ears that long for people to say something nasty about the nuclear industry.

And so then they're subpoenaed by the NRC staff to testify and they're there, what was obtained by this arcane and convoluted exercise?

Mr. AUSTIN. Senator, you stated it right this morning that there's so much legality in this whole process and it's slowed down so much that just a practical guy like me, you're trying to speed up the process. You're not trying to by-pass anything, or to not do something safely, and I implore you—you can beat me all you want to here today, that's what I get paid for——

Senator SIMPSON. Will you lay your body down there?

Mr. AUSTIN. Yes, sir.

Senator SIMPSON. I have a cat-of-nine under here.

Mr. AUSTIN. And if you will straighten it out, I will thank you ever so much, and we're not perfect. But I have tried to put everything—we've got one of the best safety records in the world, and you don't get it by pushing people around, and would you please let me correct, I think, what you said, that we thought Mr. Macktal was just a piece of trash——

Senator SIMPSON. No, I didn't say you said that. I said, the document was a piece of trash.

Mr. AUSTIN. I'm sorry, I'm sorry, I'm sorry. Okay.

I respect you, but I'll lay my body down or do anything, but let's straighten it out.

Senator SIMPSON. Okay.

Anyway, I think that's enough. Nuclear safety issues is the whole purpose of the NRC. There is no other function for it, nothing, nothing. It's not there to invent work for lawyers, two levels of lawyers, one level of lawyers, staff beyond comprehension, layer upon layer. It's not there for that. It's human health and safety. And it seems to me that testimony regarding nuclear safety issues—I don't understand how it gets into the realm of settlement

of employment discrimination claims. It should not be, and it's not going to be allowed to continue. I don't care what happens.

And this good Chairman, who I've learned to trust and enjoy, and we don't always agree on everything, but you do agree when something just hits you right in the head like a two-by-four. And this is crazy, absolutely crazy.

Mr. AUSTIN. I trust both of you to straighten it out.

Senator SIMPSON. Well, I don't know. We'll try.

Senator BREAUX. Let me ask another question, perhaps of the lawyers, or perhaps of Mr. Austin. Why was it not possible, in the interests of settlement and in the interest of moving the process forward, just enter into a financial settlement with a former employee, disgruntled, or whatever, to settle the case without placing restrictions on that employee's ability to go before the Federal Government and say what his concerns were with regard to safety problems? Why couldn't you just negotiate an agreement and say, Mr. Macktal, we want to pay for your lawyers, we want to pay for your inconvenience, we want to get on with the plan, and not have to have pages of restrictions on their ability to do something which is supposed to be violation of existing law?

Mr. AUSTIN. Could I ask Mr. Augenblick to respond?

Mr. AUGENBLICK. I think the short answer is we could, and perhaps with the benefit of hindsight we should have. And in the future, with the benefit of the guidance from the NRC that we have received, we will.

Senator BREAUX. I think that's a telling answer.

Thank you very much. Mr. Austin, thank you, we appreciate it.

Mr. AUSTIN. Thank you.

Senator SIMPSON. We invite up at this time, Ms. Billie Garde. Ms. Garde, we're glad to have you here.

We're delighted to have you appear before us this afternoon, and let me say at the outset that when Mr. Macktal was here, he raised some questions with regard to an area that could possibly invoke an attorney/client privilege when he talked in terms of type of pressure that he said he felt when his contract, that you apparently were representing him on, was presented to him. He talked in terms of duress and what-have-you. Let me state for the record, that it is the Chairman's opinion that in opening up the question of the type of negotiations between you and he that were being covered during that contract negotiation that he, in fact, has waived his client privilege with regard to that area.

I do not interpret it as waiving his attorney/client privilege in any other area, unless I can be shown that some other areas were, in fact, gone into. But I think that on its face, he did talk about duress and some other phrases dealing with the type of effort that was made on the contract negotiation.

Do you understand what I'm saying, Ms. Garde?

Ms. GARDE. I understand what you're saying, Senator Breaux.

Senator BREAUX. You may disagree, but I just want to make sure you understand.

Ms. GARDE. I'm represented by counsel and accompanying me today is Ms. Mona Lyons, and she'll address those issues.

[Witness sworn.]

Senator BREAUX. Thank you very much, please proceed.

Ms. LYONS. Why don't we just go ahead with the statement, then, Mr. Chair, if we could then discuss these privilege problems as we go along.

Let me just state at the outset that my function here is not to prevent Ms. Garde from telling you anything, it's quite to the contrary. It's to guide her through the waters that have become rather deep now, because of Mr. Macktal's insistence that he has waived nothing. She is eager to talk to you about the Macktal settlement. She is willing to talk to you about it. There is nothing that she will not tell you if he gives her permission to do so.

TESTIMONY OF BILLIE PIRNER GARDE, ACCOMPANIED BY MONA LYONS, COUNSEL

Ms. GARDE. Chairman Breaux, I've prepared a statement and I'm going to read through that briefly.

Good afternoon Chairman Breaux and Mr. Simpson.

Although I've been subpoenaed here to address a question of policy, I cannot ignore the reality that this subcommittee has received very disturbing information that, if true, would merit this substantial inquiry. For, if true, it would mean that the licensing of the Comanche Peak nuclear powerplant is being accomplished through a grand conspiracy, in which Texas Utilities Electric Company bought off Juanita Ellis of the Citizens' Association of Sound Energy, the most persistent, dedicated, safety-minded and successful citizen intervenor in this country; and bought off the noisiest, busiest, angriest, and most aggressive of nuclear whistleblowers whom I have ever had, or will have, the privilege of representing; while three of the fairest, most active and inquisitive safety minded Atomic Safety and Licensing Board judges looked the other way; and all five NRC commissioners winked at Victor Stello and blindly authorized the licensing of an unsafe nuclear plant by default.

This subcommittee simply cannot indulge the absurd fantasy embodied in those allegations any longer. The fine reputations of Mrs. Ellis and CASE have already been unnecessarily and unfairly maligned by these untrue allegations. Moreover, not only have Mrs. Ellis' feelings been deeply hurt, but the phenomenal results of her 15-year crusade for safety of the Comanche Peak nuclear power plant are being cheapened so long as those sinister inferences are dignified by attention.

The answers to the specific allegations which apparently give rise to this inquiry are very straightforward, and I would like to get them out of the way.

First, no one from Texas Utilities Electric or any of its subcontractors has ever offered hush money to anyone connected with any Comanche Peak settlement, large or small, old or new, that I was ever involved with. It hasn't been discussed, and it hasn't happened.

Two, I didn't get rich from the Comanche Peak settlements. I was paid my regular salary from the Government Accountability Project, a public interest law firm, for all the work I did on behalf of CASE from 1983 through September 1, 1988. My law firm did receive a standard contingent fee from the settlement of the claims of three workers whom I represented in my private capacity. That

representation of those workers was in accordance with a long awaited phase out plan for the Midwest Office of GAP and my establishment of a private law practice.

Three, I do not believe that the January 2, 1987 settlement agreement between Joseph Macktal and Brown & Root is illegal, notwithstanding the two provisions in that agreement which have generated so much undeserved controversy.

Four, I did not then, and I do not now, find the non-volunteer or notice clause of the settlement agreement to be contrary to the public interest in nuclear safety, much less illegal. That opinion is based on the premise that a worker has already disclosed all safety concerns known to him to the utility and the NRC by the time any labor settlement negotiations begin. Under these circumstances, there clearly is nothing wrong with a worker getting back to work and on with his life while the NRC pursues his disclosed safety concerns.

I, along with Tony Roisman, did agree to the provision in the January 2, 1987 settlement agreement under which we would not call Joseph Macktal as a witness in the NRC operating licensing hearings. That decision conceded nothing, because, for reasons I cannot disclose or discuss here absent Mr. Macktal's waiver of the attorney/client privilege, Tony and I would not have called Mr. Macktal as a witness on behalf of CASE. Moreover, had Mrs. Ellis rejected our advice that Mr. Macktal not be called, the express terms of that provision show that we preserved the right for her to call him as a witness, and for any other party or the Licensing Board to do likewise. Although I personally find the restriction offensive and I sincerely regret the mistaken inferences and implications its existence has created, it has had no impact on the licensing hearings or on public safety.

As you know, Mr. Macktal refuses to let me tell you much about the settlement of his case, or to put paragraph three of his individual agreement with Brown & Root into its real life context. All I can tell you is what you already should know. That is what the public record discloses. Suffice it to say the settlement between Mr. Macktal and Brown & Root had absolutely nothing to do with the settlement of the Comanche Peak licensing case, and did not ever prevent him from taking any safety concerns to the NRC staff or pursuing them.

Unlike Mr. Macktal, my client, CASE, has authorized me to talk freely about the Comanche Peak licensing proceedings and to answer any questions that the committee may have about the settlement of that case. To put it simply, the novel terms of that agreement do not compromise safety at the Comanche Peak plant and, indeed, hold the promise of increased safety at other nuclear powerplants.

It has always been my belief that the Comanche Peak settlement provides the best possible chance that real safety questions about that plant will become known to CASE, and also provides the tools and resources for that organization to pursue those questions. It also insures that, if necessary, CASE may demand adequate corrective action through the NRC, Congress, the media, or public exposure of the problem.

As the attorney for CASE I was in charge of discovery in the operating license hearings. I am now assigned to the Monitoring Project and serve as an alternate member on TU Electric's Operations Review Committee for Mrs. Ellis. From this perspective I can assure this committee that the terms of the Joint Stipulation literally open the flood gates of information about any Comanche Peak secrets. In fact, it is accurate to state that CASE learned more about the plant in the first few months under the stipulation than it had learned through years of discovery.

Additionally, if TU Electric had any secret plans of muzzling its work force by the existence of the TU/CASE settlement agreement, such plans could not withstand the impact of comprehensive training for all mid-level management personnel on how to encourage and support professional dissent from workers about safety concerns. I conducted those sessions personally.

As to the policy question concerning the employee protection provision of the Energy Reorganization Act, which I have been asked to address, I welcome the opportunity to do so and to have my views considered by this subcommittee. For the past 7 years, I have worked with and represented citizens groups and intervenors across the Country in various licensing and enforcement actions before the NRC, including the citizens opposing the Midland nuclear powerplant in Michigan, Zimmer, Catawba, LaSalle, Fermi, Wolf Creek, South Texas, and even the Waterford plant in Louisiana, as well as many other nuclear construction projects throughout this Country.

Since 1984, most of my professional time has been spent representing employees of the nuclear and related industries who have lost their jobs and careers as a result of blowing the whistle on conditions or practices which they believe to be illegal, improper or unsafe.

The results of the disclosures of my clients and others are well known to the nuclear industry and to the NRC. In fact, it is fair to state that whistle blowing about safety concerns at nuclear sites across the Country has changed the face of the industry in the past decade. Since 1982 worker disclosure about unknown and unresolved quality and safety concerns have led to the demise and cancellation of plants that were accidents waiting to happen, and reinspection and repair of plants that would have been far more dangerous without such disclosures. I am extremely proud of the role that I have played in representing nuclear industry workers who have challenged that monolithic industry in an attempt to insure safety for their neighbors and communities.

The personal price that those workers paid for their courage has always been too high. Congress anticipated this predicament by establishing a two-prong regulatory scheme designed to protect nuclear whistle blowers from retaliation after raising safety concerns about a nuclear power facility where they are employed. Both the Department of Labor and the NRC have designated roles to insure that all nuclear plant work places are free from harassment, intimidation, and any threats that created a chilling effect which prevents employees from raising safety concerns.

The Secretary of Labor has been charged with the responsibility of investigating individual worker complaints, and ultimately

ruling on the question of whether evidence presented to an Administrative Law Judge establishes that an individual worker has been retaliated against. But as a matter of law the Secretary has no responsibility in determining what the implications are to the public health or safety of any individual case. The Secretary also has no responsibility or duty to insure that employees who challenge retaliatory action in other forums are made whole. The Secretary simply has a duty to timely investigate and adjudicate those retaliation complaints brought before her under the ERA.

The NRC has separate and distinct responsibility to insure that working environments at nuclear powerplants accept and encourage professional dissent so that the public has the benefit of the eyes and ears of every industry employee to help insure safety. The NRC has the right and the duty to take appropriate remedial and enforcement action, including denial or revocation of an operating license, in response to any industry retaliation against workers for disclosure of nuclear safety concerns.

For 7 years I have been trying to get the NRC to honor that obligation and take action in whistle blower cases where evidence exists that harassment, intimidation, or pressure not to disclose safety concerns is a reality. But the agency's track record in protecting whistle blowing in the nuclear work place is not an impressive one.

Unfortunately, only persistent public advocacy by the private sector, the noisy campaigns of citizens, workers and their lawyers, seem to produce any action by the NRC. It is this which is bargained away by nonvolunteer or notice clauses, not safety concerns.

I have certainly litigated against lawyers representing the nuclear industry who have negotiated for peace from the public flogging of their clients by workers and citizens' groups. But no utility lawyer has ever bargained with me for silence about safety concerns. Furthermore, I would aggressively resist and expose any effort by a utility lawyer or anyone else, including my client, to trade safety for silence.

Fortunately, all of my clients and former clients first disclosed all they knew about safety to their management or the NRC or both, and then were fired or retaliated against, so silence wasn't a commodity that was up for negotiation. However, as an attorney retained to represent the best interest of my clients it is not impossible to imagine a situation in which I would have to advise a client who had not yet disclosed all of his safety concerns between accepting a gag order or endless litigation with virtually no hope of success. Every client I have ever represented would, with few exceptions, resist a money for silence offer. However, many, if not most, would readily accept a non-volunteer or notice clause as a way to end the battle which has usually ruined their lives. Such non-volunteer clauses do nothing more than end the concerted public efforts of the worker to get the NRC to do what it should have been doing in the first place.

As an attorney, I have no right to challenge the decision of a worker to stop being a driving force for nuclear safety. If the NRC refuses to pursue safety concerns, the worker has no legal duty to become a martyr or a single minded activist in the agency's stead. Workers have a right to peace too. I've known too many whistle

blowers who have never recovered from their experiences to advocate a course of conduct that has no room for compromise.

If this subcommittee genuinely wants to lower the price nuclear workers pay for their courage, and increase the flow of information, it should focus on the NRC's handling of worker allegations, not lawyers' conduct in settling cases on behalf of weary clients.

Thank you for the opportunity afforded me to appear, and I will attempt to answer any questions the subcommittee may have.

Senator BREAUX. Thank you, Ms. Garde, very much for your statement.

You, as your testimony indicates, have been involved in these type of efforts and litigation for about seven years.

Ms. GARDE. Yes, sir.

Senator BREAUX. You're very experienced in this business.

Can you tell the committee what your interpretation as to the meaning of what section 210 of the Energy Reorganization Act, and the NRC regulations dealing with the question at hand, as well as the general counsel of the NRC's opinion means to you? What does the gist of those statutes tell you that is allowable and is not allowable?

Ms. GARDE. Well, sir, I think that section 210 is silent as to any specific required or precluded language in any settlement agreement. Settlement agreements are supposed to be reviewed by the Secretary of Labor in some manner, although the regulations do not specify the details regarding that review either.

It's clear to me that the issues of concern to this committee, that is bribery or hush money, would be precluded. The non-volunteer clause, or the notice provision, I do not think is precluded by section 210, or any of the terms or conditions that the NRC has currently in place, or that they had in place at the time.

Senator BREAUX. When the general counsel of the NRC says that he has concluded that a section 210 settlement agreement which poses restrictions on an individual's ability to appear before the NRC, or any agency of the Government, that that is an unenforceable provision in that type of a settlement agreement, and that it's prohibited. I take it, by your statement, you disagree with his opinion of what section 210 says?

Ms. GARDE. Well, I have not seen his opinion. I know Mr. Mullins. I assume he did careful research and work. I haven't seen his opinion, so I really can't tell you if I agree or disagree with the reasoning behind it or what the general conclusion is.

Senator BREAUX. Let me ask you this, what in your opinion did the settlement agreement attempt to accomplish.

Ms. LYONS. I'm going to have to interject here, if I can.

Senator BREAUX. Sure, go ahead.

Ms. LYONS. As we know, Mr. Macktal has not waived the attorney/client privilege for Ms. Garde to answer that question. She will have to disclose confidences and/or secrets of her client. That is prohibited under the governing rules of the Supreme Court of the State of Wisconsin where she's a member of the Bar. If you believe that there has been a waiver of the privilege based on what he's represented so far, she stands ready, eager and willing to talk to you about the circumstances of this settlement and what it was designed to accomplish.

Senator BREAUX. Let me ask you this question, then.

The contract that we have a copy of has it being signed by Billie Garde for Macktal.

Ms. GARDE. Yes, sir.

Senator BREAUX. But it also has it being signed for yourself, so as relates to this contract, which was signed for you, by you, what was the purpose of it?

Ms. GARDE. As you know, there's a part of the provision in paragraph 3, I believe it's the first section, which I and Mr. Roisman agree that we will not call Mr. Macktal as a witness in the licensing hearings. That signature for me, on behalf of me, goes to that section of paragraph 3.

Senator BREAUX. Did it mean, in your opinion, that you would not have to represent Mr. Macktal before any agency of the Government?

Ms. GARDE. I'm sorry, I don't understand your question?

Senator BREAUX. Well, when you signed the contract, did you say well, when I sign this contract and I get my attorney fees paid, does this mean to me that I will not have to represent anybody, including Mr. Macktal, before the NRC, before any agency of the Government?

Ms. GARDE. First, sir, let me clarify that I didn't receive any attorney fees personally from that case. I was an attorney on the staff of the Government Accountability Project at the time and was receiving an annual salary.

Senator BREAUX. Did they receive some of the attorney fees?

Ms. GARDE. They received a portion of the Macktal settlement as attorneys fees.

Senator BREAUX. And you were paid by them?

Ms. GARDE. Yes.

Senator BREAUX. Okay.

Ms. GARDE. In response to your question of whether I didn't have an obligation or a continuing obligation to represent Mr. Macktal in front of any other Government body, is that what your question is?

Senator BREAUX. That's correct.

The contract says that he's not going to have to voluntarily testify before the NRC or any other Federal agencies. Was part of the contract for yourself, the fact that you would not have to represent him, in your opinion, before any of the Government agencies if the contract was negotiated?

Ms. GARDE. No.

Senator BREAUX. You felt that after signing the contract, that you were still likely to have to represent him in testimony before the NRC?

Ms. GARDE. There was outstanding safety allegations that Mr. Macktal had raised to the NRC some time earlier, very early in this case—that's a matter of public record. Had Mr. Macktal needed representation for any further meetings with the NRC staff, regarding those safety allegations, I do not view anything in that settlement agreement as having precluded me from, for attending a meeting between the NRC staff inspectors or investigators working on his safety allegations and Mr. Macktal.

Senator BREAUX. Let me ask you this. On page 3 of your testimony you get into, in some detail, the contract that you're now talking about attorney/client privilege, when you say I did not then, and do not now, find the non-voluntary clause of the settlement agreement to be contrary to the public interest of nuclear safety, much less illegal. You further continue by saying that opinion is based on the premise that a worker has already disclosed all safety concerns known to him to the utility and the NRC by the time any labor settlement negotiations begin.

Now, let me ask you, does the settlement agreement in any way state that the person signing the agreement has already told the NRC, or to any Federal agency, everything they know about any safety concerns at the plant?

Ms. GARDE. The document——

Senator BREAUX. Because if it doesn't, which it——

Ms. GARDE. Well, the document speaks for itself. It doesn't have that language in it.

Senator BREAUX. It doesn't have that language. So my question is, how do you know that a person that enters into one of these settlement agreements has already, in effect, told everybody everything that he already knows? It's not part of the document. If you read the document it doesn't say anything about I'm not going to voluntarily testify because I've told them everything already. It doesn't say that at all.

The document simply says, I'm not going to voluntarily testify, and if they subpoena me folks, I'm going to do everything I can to avoid the subpoena, legally.

Ms. GARDE. Well, the language that you suggest is not in that settlement agreement. With the benefit of hindsight such language certainly would have clarified that point. It's clear to me that that point was clear between the attorneys.

Senator BREAUX. Let me ask about the other issue that I'm concerned about regarding the $4.5 million settlement that was approved and entered into with Texas Utilities and the $5.5 million settlement that was agreed to. Were you involved in either or both of those settlement negotiations and those contracts with those settlements?

Ms. GARDE. Yes, sir.

Senator BREAUX. Which one, both?

Ms. GARDE. Both.

Senator BREAUX. Both.

Can you tell the committee what was the linkage between the ability of the people to get those amounts of money with the dismissal of the licensing procedure pending before the NRC?

Ms. GARDE. I assume that you understand that the status of the licensing case at the time that the settlement agreement and the operating license hearings was entered into, was between CASE, who was the admitted intervenor, and Texas Utilities Electric, and that the NRC staff signed that agreement.

The workers who received offers, some of which, the majority of which who accepted the offers of settling ongoing labor litigation claims had no status in the operating license proceedings. The only reason that that money was offered to any workers, was because Juanita Ellis, the citizen intervenor, insisted that if Texas Utilities

was going to settle with her, that they make a good faith offer to settle the claims of whistle blowers who had pending litigation against Texas Utilities Electric, stemming out of what they believed were wrongful terminations at the hands of Texas Utilities Electric, or their subcontractors, as well as made some amount of money available for workers who had no pending claims, but had helped Mrs. Ellis in the licensing proceedings by providing testimony and assisting her in providing that testimony.

It is very, very simple. She was trying to do a good thing for workers who had done something for her when there was no question of money, when there was no possibility of money. Some of those claims had been going on since 1982. Those people had suffered a great deal. They had live labor litigation claims against the company and Mrs. Ellis simply put on the table something that she would have clearly walked away from, and it would have had no impact on the settlement between CASE and Texas Utilities Electric and the licensing hearings. That is the sole story. There are no hidden guns here.

Senator BREAUX. Individuals who participated in the $4.5 million settlement with Texas Utilities——

Ms. GARDE. You mean $5.5?

Senator BREAUX. No, $4.5, the fund that was established.

Ms. GARDE. The only individual—I don't understand your question.

Senator BREAUX. It is my understanding that a $4.5 million fund was established.

Ms. GARDE. That's absolutely false.

Senator BREAUX. To pay for CASE's expenses and future expenses, and expenses involved in the suit, is that not correct?

Ms. GARDE. The $4.5 million was allocated to the settlement between CASE and Texas Utilities Electric Company and the licensing hearing to pay claims—well, not to pay any claims, but to pay the expenses that they had incurred in the licensing challenge for nine years, as well as to compensate individuals who had assisted CASE in some manner, but not the workers. For example, lawyers who never got paid, lawyers who volunteered their time years and years ago, that never got paid because they had never had a dime, organizations that had provided assistance, expenses, attorneys. That's what the $4.5 million went for.

Senator BREAUX. Okay.

That's what I'm asking about. Is that $4.5 million in any way being paid contingent on any actions being taken on the dismissal of the proceedings before the Licensing Board, in any way?

Ms. GARDE. Well, the $4.5 million was the amount of money that was allocated if that case settled.

Senator BREAUX. And if that case had not been settled, the $4.5 million would not have been paid?

Ms. GARDE. Absolutely. There wouldn't have been any reason to pay it, because they would have had to continue to litigate, and I'm sure would have paid at least that much in litigation expenses to finish the licensing hearings.

Senator BREAUX. Now, let's talk about the $5.5 million that was paid to settle the various employee claims. What was the purpose

of that, and how was that interconnected, if at all, with the dismissal of the Licensing Board procedure?

Ms. GARDE. There was no connection at all with the dismissal of the licensing proceeding from the aspect of the licensing—if you look at it from the direction of the Licensing Board, the operating license proceedings itself had no connection, were not impacted in any way by the settlement of the workers claims. The workers claims never would have been settled, no money would have been paid, at least in the context of the July 1988 settlement, had the licensing hearings not been settled.

As I said before, Mrs. Ellis put on the table a request which TU conceded to that it make a good faith attempt to settle the claims of—ongoing claims with workers that had cases pending against it.

Senator BREAUX. Some of the employees that received or participated in the $5.5 million settlement, were any of them, to your knowledge, participants in the Licensing Board proceeding?

Ms. GARDE. What do you mean by participants?

Senator BREAUX. Were they involved in it, were they witnesses, did they provide testimony, did they participate?

Ms. GARDE. Many of the workers that received settlements, and there are a number of groups of workers, many of the workers who received settlements had participated in the licensing proceedings as witnesses in the early days of the Comanche Peak licensing proceedings. They had provided testimony. They had talked to the NRC and their issues were being raised in the licensing hearing by CASE. They had assisted CASE in the presentation of their issues. They'd been subpoenaed as witnesses, or they'd been called as witnesses by the Licensing Board. Those issues were completely—the issues of those workers and those workers were involved, were completely raised and aired through the licensing proceeding generally in the time frame of 1982 through the late fall of 1984 before Texas Utilities asked for the licensing hearings to be suspended.

It was, at least in part, a great part, as a result of the disclosure of those workers' concerns, that Texas Utilities Electric Company eventually—and they can speak for themselves—but, admitted that there had been a quality assurance breakdown at the plant of such magnitude that it dictated a hundred percent reinspection program. Because there was such a comprehensive reinspection program ongoing at Comanche Peak, the follow-up of those workers issues were not really before the Board any longer. Those issues had been resolved because Texas Utilities Electric had admitted and agreed to fully investigate each and every issue that had been raised.

I don't want to give you an entire chorus on nine years of litigation, but the NRC during the summer of 1984 spent literally thousands and thousands of inspector hours investigating, cataloging, digesting, and pursuing well over a thousand specific worker safety allegations, and issuing a stack of reports that would fill, literally, one whole wall of this room about up to 6 feet.

There were no unresolved, unknown safety allegations from any of the people in the groups of workers who took the $5.5 million that was offered in settlement of their labor claims. And there was no interference, as a result of that settlement, between the NRC

staff and the workers, and Texas Utilities Electric continuing to monitor and pursue those safety allegations.

One of the things that I have been doing for the last six months is in fact working on that issue, making sure that people who raised allegations, safety concerns, that they are satisfied with Texas Utilities Electric's resolution of their safety concerns, irrespective of whether the NRC has already signed off on those concerns. And one of the things that I'm doing is going back to those people and making sure of that. Some of them may not say it's okay, but there is a process in place that allows them to pursue it, that allows them to raise it, that allows them to pursue it and bring it to this Congress if they aren't satisfied with the resolution of those concerns.

Senator BREAUX. Unless they've signed a settlement agreement like Mr. Macktal.

Ms. GARDE. There aren't any settlement agreements that prohibit anyone of those individuals from raising any safety concerns, just as there was not in Mr. Macktal's agreement. And there is no licensing hearing.

Senator BREAUX. Wait a minute, wait a minute. You're talking about Mr. Macktal's agreement, you kind of opened up an edge there. Are you telling this committee that all of those paragraphs in the Macktal settlement agreement that prohibits him from voluntarily testifying or resisting any subpoenas is not a restriction on his ability to testify like you've just said?

Ms. GARDE. Well, sir, you linked up Mr. Macktal's settlement agreement that went to the issue of testifying——

Senator BREAUX. I'm talking about Macktal——

Ms. GARDE [continuing]. With pursuit of safety concerns with the NRC staff. Since there is no ongoing operating license proceedings at this point, any provisions—similar provisions, if they existed, and they don't, would be moot.

Senator BREAUX. Let me give Senator Simpson a chance.

Senator SIMPSON. Thank you, Mr. Chairman. I said some rather pungent things this morning, rather strongly. And I made a reference to trial lawyers, and it may have been that it reflected the phrase trial lawyers for public justice. I did not know the name of that group. They have contacted me since I made my utterances. I have not been aware of that group. I would not wish to cast dispersions on that group. I was speaking of trial lawyers who restrict witnesses from testifying. So let's get very clear on that. If this group is not involved in that, that's fine with me. I don't know anything about that group.

But I do know something about the code of professional responsibility. I'd like to get through all the rest of this junk and go to what is the duty of a lawyer to his client and his duty to the legal system. They are the same, to represent his client zealously within the bounds of the law, not to the best interests of the client. I'm quoting from the Code of Professional Responsibility. Your quote was, in accordance with the best interest of the client. That seems to me that's quite a distinction. And then it goes on to say under EC7-20 "in order to function properly our adjudicative process requires an informed impartial tribunal capable of administering jus-

tice promptly and efficiently according to procedures that command public confidence and respect." That's what it says.

Not only must there be competent, adverse presentation of evidence and issues, but a tribunal must be aided by rules appropriate to an effective and dignified process. I can tell you that when the layman would read a document like this, he would think somebody is really jazzing him around. That's what poor old Smokey Joe thinks when he reads something like this. This has language in it which is repugnant. And it has language that is secretive. And it has language which is obviously crafted beautifully to hide something. That's what it says.

So that's where I'm coming from so you don't misread, all the legalistics. And then you go on to the Code, section EC7-26, "a lawyer should, however, present any admissible evidence his client desires to have presented, unless he knows or from facts within his knowledge should know that such testimony or evidence is false, fraudulent, or perjured." Now we're getting closer here. EC7-27 says, "because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce," period. In a like manner, "a lawyer should not advise or cause a person to secret himself or to leave the jurisdiction of a tribunal for the purpose of making himself unavailable as a witness therein." And then EC7-28 said, "witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise."

So, why don't we just kind of stick with that curious language, because it doesn't have anything to do with legalistics, and the way lawyers ply their trades sometimes when they don't, for reasons known or unknown, don't follow the Code of Professional Responsibility as to what it does with the issue of lawyers and witnesses.

And you said, unless I missed something, that it might not be illegal but I can't remember quite what you said. You said it was not illegal. And let's leave it at that, and say that we take that for your view. But it is certainly not in accordance with the Code of Professional Responsibility, in my view, and you'll have a chance to fire away in one minute. And then you said something very curious. You said something like it doesn't matter whether it had impact, it didn't have an impact because it didn't hurt anybody. That, I think, is a very poor appraisal of an attorney's actions if it has been in violation or at odds with the Code of Professional Responsibility. That is my particular twisted view of one who practiced for 18 years. Do you have any comment on that?

Ms. LYONS. Can I interject one thing here, Senator.

Senator SIMPSON. I'd like that.

Ms. LYONS. And I have only been practicing for 14 years, not as long as you did. Whether or not any of the provisions——

Senator SIMPSON. Did you ever represent any real live human beings in divorce or murder, or anything like that?

Ms. LYONS. You better believe it, Senator.

Senator SIMPSON. Good. Well, then, let's get into it.

Ms. LYONS. This is a fairly novel experience for me sitting in front of seven cameras.

Senator SIMPSON. It can't be seven any more. They won't stay that long. They have to wait for a lot of action.

Ms. LYONS. That's right.

I would implore you, here, I think we have something sort of fundamentally unfair going on. And I know you're a fair man and I would ask you to listen for a second.

We have here a client who has asserted under, and I would quote you 1.6, the confidentiality disciplinary rules. He has asserted an attorney/client privilege here that really prevents Ms. Garde from even responding to whether or not some of the ethical considerations that you have raised apply to this particular agreement, in terms of what type of testimony would have been offered, to comment on that, what the agreements were, what the understandings were, what relevance it might have, and all the rest of it, because it would betray secrets and confidences of a client.

At the same breath he is telling you he has been muzzled, he is forbidding her to respond truthfully to the real live facts which gave rise to this unique settlement agreement. No provisions like it on the Comanche Peak settlement agreements. You know that. Those agreements have been shown to the committee, even though they are governed by other confidentiality agreements.

What you're doing here is asserting that there have been unethical behaviors here in a situation where an attorney ethically cannot respond. And it's just unfair.

Senator SIMPSON. Well, he was here, he talked about it.

Ms. LYONS. The last thing he said to you, Senator Simpson, was I do not waive my attorney/client privilege.

Senator SIMPSON. I heard him. I also know, and the Chairman very capably pointed it out, that we have a situation right here where under this particular agreement, well, you know you signed it.

Ms. LYONS. She wants to talk about it, Senator.

Senator SIMPSON. That's what we're talking about.

Ms. LYONS. But, no, she can't.

Senator SIMPSON. Well, it says she signed it on behalf of herself. There it is.

Ms. LYONS. Yes, I think she's answered that question, has she not. She hasn't declined to answer why she signed that agreement. But she cannot tell you the facts germane to why this agreement was entered into.

Senator SIMPSON. Well, then let's forget all o. it and just go to the actual document itself. We don't have to go outside the document. The document is very clear and it talks about things like restricting evidence. Now, come on. Let's quit doing the diddling around on the head of the pin.

Ms. GARDE. Senator, I didn't write that paragraph.

Senator SIMPSON. I don't who care who wrote it. That's immaterial. You signed it.

Ms. GARDE. And I have already said that I find the restriction personally offensive, and I regret the mistaken inferences and implications its existence has created.

Senator SIMPSON. Well——

Ms. GARDE. But unless I could explain to you all the circumstances behind that paragraph, you couldn't possibly sit in judg-

ment on anything other than exactly what I've already agreed with you on.

Senator SIMPSON. Well, let me tell you something, so that you'll hear me clearly. The searing light falls pretty heavy on we people in Congress. It really does. We've seen that. I don't mind that at all. And we have a rather unique responsibility. They expect perfection out of us. Go talk to Bork. Go talk to Wright. Go talk to others. That's the kind of stuff we take around here, and that's okay. That's in the way it was when we hired on here, that came with it. We know what the doctrine of *New York Times* v. *Sullivan* says. We're raw meat. So we play in that arena.

Sometimes we have a peculiar view that the light should shine with the same brilliance on those who testify before us about disclosure and intent and what language says, and what English is, and not so you can come in before us, who deal with lots of issues, and find a document that is signed by a person sitting before us, who signs "for Joseph Macktal" who says it was done now for various reasons and he didn't like it, forget it, then. He mentioned duress, I didn't.

So I don't know what you had with Macktal, but that isn't the issue here. But you put in here, "and herself." That's what this said. So as herself, how many pieces of this document, like the language of, do not call him as a witness, resist compulsory process, not voluntarily appear, with prejudice, dismissal, will remove personal file, indicate only that he quit or resigned, that things will be sealed to provide no information about him, and on and on, not reveal any further information. What parts of this document signed by you, that you repudiate so hardily, how much of it do you repudiate? Can you be precise for us? Can you take a yellow pencil and say what parts of this you repudiate? That's what I'm talking about.

Senator BREAUX. Let me, at this point, because I think the Senator has phrased the question very accurately, you ought to make your counsel listen to this, with regard to the attorney/client privilege. Mr. Macktal, when he appeared here talked about some of the conditions under which he signed the contract, alleging duress. You certainly have a situation where that privilege has been waived on your client's part when he talked about that. You can address that subject, and I would hope that you would.

Secondly, Mr. Macktal, when he testified went to great lengths to testify to his interpretation of this contract just like Senator Simpson has pointed out, what it meant, what it restricted him to, what it prevented him from doing. What it allowed him to do. To the extent that that is already on the record by your client, any questions regarding a rebuttal of that is certainly not an invasion of an attorney/client privilege after he has already opened this whole area up and spent a great deal of time talking about his interpretation of what this contract meant. That is already on the record, extensively and elaborately, and he was questioned on it.

So it's the opinion of this committee that you are not able to invoke an attorney/client privilege to not talk about something that is already on the public record, put there by your client.

Ms. LYONS. Senator, let's get two things straight. There is no invocation of an attorney/client privilege here by Ms. Garde. She

doesn't have one to invoke, she doesn't assert one, she wishes Mr. Macktal would waive it.

Secondly, is that a final ruling of you that there has been a waiver on the attorney/client privilege with respect to whether or not there was any duress in the formation of this contract. If it is final, Ms. Garde's obligation, according to the ethics consultants in the State of Wisconsin are that she has to give Mr. Macktal an opportunity to appeal it, if it is not final. He's in the room. If that's your final determination, she stands ready and able, and willing to talk about the formation of this contract.

Senator BREAUX. It's very clear. I've said—I'll try and repeat it again.

Ms. LYONS. Okay.

Senator BREAUX. With regard to the question of duress that question has been raised by your client. He said that there was duress. You can address that question. With regard to the questions asked by Senator Simpson as to the meaning of this contract, that question has already been asked and the answer has already been given by your client. He's been extensively examined on that question and the Chair rules that with regard to both of those areas that those client privileges have clearly been already waived by his testimony. Now whether he interprets that as a waiver or not, it is this opinion that in opening those questions up about the intent of the contract, and the purpose of the contract, that that is behind us.

With regard to the question of whether he signed it under duress, that has already been an allegation by him which opens that question up for you. And the question of Senator Simpson, I think, is to the interpretation of some of the things he just asked.

Senator SIMPSON. I guess, I'll try to——

Ms. GARDE. Can I have the specific question that you want me to answer, Senator Simpson?

Senator SIMPSON. Well, yes, I talked about this document which you signed, "by herself" it says. So I didn't think there should be any waiver of anything. And I asked you how selective are you going to be? I asked you about one particular thing which seemed to twang on you and you said something to the effect that you really repudiate that, you didn't agree with it, didn't like it, were appalled by it. How many things in here can you point out to us that fit that same category? Do you—and I mean that sincerely, do you want to get a chart and show us what parts of this thing you signed you don't agree with, because it's chock full of restrictive language how you keep a person from testifying, and to me that's a violation of the Code of Professional Ethics. And I guess that's as close as I can get to cutting the mustard. Now what do you have to say to that?

Ms. GARDE. Well, I don't have a copy of the agreement in front of me, sir. If I'm provided with one, I'll answer your questions as to each specific paragraph.

Senator SIMPSON. Well, okay. But I don't have time to do that. But let's just say, doesn't it bother you a bit, as an officer of the court, that's what we were when I practiced law, you're an officer of the court. Did the judge ever say anything about this remarkable document when it went in, or the adjudicating officer? Did he

ever look at this? Was this ever shown, or was this just filed and then you streak out of the courthouse? What happened to this baby? Did the judge ever look at this? Did an order ever follow this settlement agreement, where a judge said this agreement is hereby incorporated as a decree of the court, or something of that nature?

Ms. GARDE. An order followed the agreement. And I don't have a specific recollection on when that order was issued, or whether the judge—or whether the administrative law judge saw the specific language of the settlement, or was just advised that a settlement had been reached?

Senator SIMPSON. And did the judge know that this was "strictly confidential" and maybe never saw it as he did his order upon a document that he may never have seen? Maybe?

Ms. GARDE. I don't understand your question. If the last part of your phrase is referring to the judge in the NRC licensing hearing——

Senator SIMPSON. This is presented before the U.S. Department of Labor. I'm sure that there's an adjudicatory officer——

Ms. GARDE. There was an administrative law judge that was assigned to this case.

Senator SIMPSON. Okay. And he or she——

Ms. GARDE. It was she.

Senator SIMPSON [continuing]. Probably never saw this since it's called "strictly confidential" and then issued an order on this perhaps.

Ms. GARDE. I don't remember if this document was specifically given to the ALJ since it was drafted sometime after the date upon which the settlement was actually reached.

Senator SIMPSON. Well, let me get to a final question. You can answer this any way you want, but I don't see how you cannot give me a response.

Doesn't it bother you, as a lawyer and an officer of the court—now, let's get this quite clear. I'm not picking on anybody, that a settlement agreement that you helped to negotiate, and then signed, not only for your client, but for yourself, in an individual capacity as an attorney officer of the court, that you negotiated and put together calls for a person not to testify.

Ms. GARDE. I regret the inferences and the implications that are created by the language which I absolutely understand, and personally find this offensive. I do not, under the particular circumstances of this case, find that agreement to in any way violate my commitment as an officer of the court. To the contrary, I think that my agreeing to this provision was in compliance with every ethical rule that I was aware of. But I cannot explain to you the basis for that position. And I wish I could. No one wishes that more than me.

Senator SIMPSON. I wish you could too, because it would give the appearance to the layman—and I practiced law and love this profession—but it would give the appearance of very secretive negotiations that was done with arcane thoughts. I don't know what that would lead a person to believe. But it certainly wouldn't give them a better impression of the law, and the lawyers, and that's why we're in trouble in our profession, in yours, and ours as politicians. It's called gobbledy gook when very real documents can be ex-

plained away by saying, "well, I signed it, but I didn't like that part," and "I did like that part," and "I don't know what that is." And a Code of Professional Responsibility which is to get to a speedy and just trial of issues, it's called Rule 1, and we've forgotten that.

Thank you.

Senator BREAUX. Thank you, Senator Simpson. Let me ask one other question, because in fairness to you I want to give you the opportunity to address the issue.

When Mr. Macktal did appear he talked about the contract that he signed that he felt duress when he signed it. And I would ask you, was there duress from your perspective?

Ms. GARDE. I'd like to consult with my attorney for just a second.

Senator BREAUX. I say, that he has waived his privilege on the question of duress.

Ms. LYONS. Would you please just tell us for the record that he has no right of review of your determination? That this is final decision of this tribunal?

It is Mr. Macktal's right to seek review, not Ms. Garde's. If he's in the room, maybe he would indicate whether he wants such review sought?

Senator BREAUX. Let me ask his counsel, and it may solve the problem real quick, and if it doesn't we'll have to consult further.

Mr. Kohn, K-O-H-N, who represents Mr. Macktal, I think heard the question and my response with regard to my ruling that this witness would be able to address the question of duress in signing the contract because your client, when he had testified this morning, raised that issue and said that he felt duress when he signed the contract. My question to her is to ask if from her perspective, was there in fact duress associated with signing the contract.

Do you have any problems on behalf of your client with this witness responding to that question, or with the ruling of the Committee Chair as to the appropriateness of that response?

Mr. STEPHEN KOHN. None at all.

Senator BREAUX. Would you come up to the table so we can get it on the record?

Mr. STEPHEN KOHN. Senator Breaux, our main concern with the attorney/client privilege is that we are seeking to have the settlement disapproved by the Secretary of Labor. And at that point the case would be remanded for trial on the merits of Mr. Macktal's wrongful discharge claim. In that case, if there was a waiver of the attorney/client privilege Ms. Garde would be free to put information on the public record which would interfere with his substantive case against Brown & Root. That is our major concern.

In terms of the very narrow question of whether between December 29, when the first documented indication of duress was placed on the record, and January 3, when the settlement was executed, in terms of that limited scope, we are willing to have Ms. Garde answer the question. But only in terms of that time period, December 29 to January 3.

Senator BREAUX. I want to make sure we're handling the right thing. Mr. Macktal, you can come on up, if you want, but my question is when Mr. Macktal testified this morning about duress with

regard to the contract, is his, and was his testimony limited to the period between December 29 and January what?

Mr. STEPHEN KOHN. January 3.

Ms. LYONS. If I may, just for the record, the agreement was reached in November 1988. It was just not signed until the dates were referring about.

Mr. STEPHEN KOHN. Your Honor, we do want to keep it to those dates for the following reason, there is actually, and again because the case is in ongoing litigation, there are actually two separate settlements. There was an oral settlement in November, and then there was the written settlement in January. It was our client's understanding that the oral settlement would only last for 30 days. It was an open period for 30 days. When the 30 days expired, the settlement ended.

Senator BREAUX. For the purposes of my rule, let me ask a question. Was your client's statement this morning alleging duress between the period of December 29, and January 3 only? Not addressing any other area, not saying there wasn't or was, but addressing only the period between December 29 and January the 3?

Mr. STEPHEN KOHN. Okay.

To clarify, although we believe there was duress during the entire period of time, I believe the specific testimony he gave referred to allegations in his affidavit, which concern the 29th period to the 3d period.

Senator BREAUX. Mr. Kohn, you've just opened up the period other than December 29 and January 3 by alleging what your client believed happened prior to that time.

Ms. LYONS. Senator, if it would help and you want to withdraw the question for Ms. Garde, we're perfectly content with that manner of proceeding.

Senator BREAUX. Well, if Ms. Garde is satisfied, and your client is satisfied with that procedure, that would solve the problem.

Ms. LYONS. She will proffer that there was no duress at any time whatsoever, and since she cannot prove that there was none without having a waiver of the details that would demonstrate that there was none, it's a meaningless answer in any event.

Senator BREAUX. That probably solves the problem.

Thank you, Mr. Kohn. I think that probably takes care of Ms. Garde. Thank you very much for being here. Thank you for your attendance.

Let me invite up our final witness for this afternoon, Mr. Michael Spence, who is president and representing Texas Utilities Generating Company, and if he's accompanied by colleagues and counsel, please introduce them for the record.

Mr. Spence, we're glad to have you with us. If you could summarize your testimony, and please identify your colleague.

[Witness sworn.]

STATEMENT OF MICHAEL D. SPENCE, PRESIDENT, TEXAS UTILITIES GENERATING CO., ACCOMPANIED BY GEORGE EDGAR, COUNSEL

Mr. SPENCE. Mr. Chairman, my name is Michael D. Spence, and I'm President of the Generating Division of Texas Utilities Electric

Company in Dallas. I'm accompanied today by Mr. George Edgar of the Washington Law Firm of Newman & Holtzinger, who is legal counsel to my company.

Texas Utilities Electric Company is presently constructing the Comanche Peak Steam Electric Station near Dallas. As we understand it, the subcommittee is conducting an inquiry concerning whether and to what extent agreements to settle litigation brought by Comanche Peak workers impeded the presentation of information regarding nuclear health and safety concerns to the NRC. I would like to first assure this subcommittee, that TU Electric has not impeded the flow of information to the NRC and that any such action would be contrary to our established policies and practices.

In July 1988, we arrived at a settlement of the more than nine years of litigation before the NRC and the Federal courts relating to our operating license application for Comanche Peak. This settlement, which was agreed to by the sole intervenor in our litigation, Citizens Association for Sound Energy, CASE, and the NRC staff was reviewed and approved by the Atomic Safety and Licensing Board before whom the litigation was pending.

Nothing in this settlement restricts communications with the NRC. Quite the opposite. The settlement provides a series of mechanisms which are described in my written testimony for increasing these communications. Most importantly, the settlement expressly states that nothing in the agreement shall preclude CASE from taking safety issues to the NRC. There was an extensive substantive foundation for the settlement.

In response to concerns raised by CASE, the ASLB, and the NRC, we developed and implemented a Design and Construction Quality Validation Program, the depth and breadth of which is unprecedented in our industry. TU Electric also engaged in extensive technical interchanges with CASE over a 2-year period, aimed at mutual understanding of the issues.

All the while, the NRC staff was engaged in intensive reviews and inspection of Comanche Peak, and specifically approved the Quality Validation Program. The NRC staff's review was paralleled by vigorous oversight and scrutiny from the ASLB.

All of these interactions led the parties to conclude that the remaining issues associated with the final implementation of our programs and completion of Comanche Peak could best be resolved by a process that gave CASE an inside vantage point to monitor Comanche Peak activities and established a dispute resolution mechanism that focused on technical rather than quasi judicial processes.

While differences remain to be resolved, the parties agreed on a process where technical issues could be rationally debated and resolved so that the parties' common objective could be satisfied—to assure that Comanche Peak is safely designed, constructed, and operated.

We have not been involved with any agreements that have been intended to, or in our view, have had the effect of restricting anyone's right to provide information to the NRC. Out of CASE's concern for former Comanche Peak workers, our agreement with CASE committed us to negotiate in good faith to settle pending litigation by former workers. None of the releases or agreements associated with those settlements in any way limit the ability of work-

ers to present nuclear safety information to the NRC. In fact, the agreements settling those worker claims arising under Section 210 of the Energy Reorganization Act expressly state that the workers are expected to disclose their safety concerns to TU Electric and to participate in their resolution and that nothing in the agreement shall sacrifice the worker's rights to contact the NRC staff with his or her concerns.

Let me make a few comments about NRC rules and regulations regarding Atomic Safety and Licensing Boards, in connection with the Joint Stipulation associated with the CASE settlement. An Atomic Safety and Licensing Board hearing for an operating license application is not mandatory. Many plants are licensed without having such hearings. The NRC staff has the primary responsibility for resolving safety allegations and issuing an operating license.

The ASLB role in the licensing process could generally be described as one of conducting hearings on issues placed in controversy by the parties to the proceeding. As has been said here before today, CASE, as an intervenor, was a party to the Comanche Peak licensing hearing proceeding for nine years. The process in the Joint Stipulation in the CASE settlement is not a substitute for ASLB hearings. It is in addition to the normal NRC process that applies when there are no hearings. CASE, and only CASE, had a right to seek dismissal of the hearings. But in such a dismissal CASE got more than the limited rights of a party to an ASLB proceeding. By dismissal CASE received the right to monitor plant completion activities from inside the plant.

As a result of the settlement no other NRC processes are changed. In fact, Mr. Victor Stello of the NRC insisted on that premise as a part of his agreement to the Joint Stipulation. The NRC is aware of CASE's monitoring activities at the Comanche Peak site. The NRC is kept informed of any disputes that arise between TU Electric and CASE, and those disputes go to the NRC for resolution. This process does not take issues away from the NRC, rather it gets issues out of the hands of lawyers and into the hands of technical people.

Furthermore, in regard to that settlement and any accusation of impropriety, if you knew CASE's and its attorneys' resolve, its dedication and its commitment to assuring the safety of Comanche Peak Nuclear Power Plant, you could not believe that they would take any action which would compromise the safety of that plant. CASE and its technical representatives are at the plant day and night. As an aside, and as a specific example of that fact, recently with the commencement of an important test of safety related systems at Comanche Peak representatives of CASE, including Ms. Garde, were at the plant as early as 3 a.m. to personally observe the conduct of that test. They are being heard loudly at Comanche Peak and they cannot be silenced.

We understand that the subcommittee has specific concerns about the restrictive language in the settlement agreement between Joseph Macktal and one of our contractors Brown & Root. That language is now under review by the Department of Labor. I should point out, however, that Mr. Macktal spoke to the NRC staff at great lengths about his safety concerns before the settle-

ment agreement was reached. All of the safety concerns that Mr. Macktal has been willing to present to the NRC staff have been addressed. Thus, the Macktal settlement did not impede the flow of safety information to the NRC. In any event, Brown & Root has since advised Mr. Macktal that in light of the NRC's April 27, 1989 directive to all licensees, it will not enforce any restriction on the presentation of safety information to the NRC.

We have informed your staff that we are aware of one other agreement entered into by another of our contractors, Gibbs & Hill, which contains language similar in some respects to the Macktal agreement. The Gibbs & Hill agreement, however, contains an explicit stipulation that nothing in the agreement shall preclude the worker from taking concerns to the NRC. In fact, all of this worker's concerns were extensively reviewed and addressed by TU Electric and the NRC. This settlement agreement is also under review at the Department of Labor.

Pursuant to the NRC's recent directive, Gibbs & Hill has also informed the former worker's counsel that it will not enforce any restriction on the presentation of safety information to the NRC.

In closing, let me repeat our commitment to promoting the flow of safety information to the Nuclear Regulatory Commission, and to assuring that Comanche Peak is properly designed, constructed and operated. While we appreciate the subcommittee's concern that worker settlements could impede the flow of information to the NRC, we are convinced that this has not been the case at Comanche Peak. We remain committed to our longstanding policies that promote the flow of safety information to the Nuclear Regulation Commission.

I appreciate the opportunity to testify here today, and I would request that the subcommittee accept my oral summary and prefiled written testimony into the record, and I'll be happy to attempt to respond to any questions that you may have.

Senator BREAUX. Thank you very much, Mr. Spence, for your testimony.

Now, I understand essentially that Texas Utilities had negotiated two major settlements with some of the people concerned and working with the Comanche Peak project. One for $4.5 million, and one for $5.5 million. Is that essentially correct?

Mr. SPENCE. Essentially, yes, sir.

Senator BREAUX. Did any of those settlement agreements that Texas Utilities negotiated have any clauses similar to those clauses restricting voluntary testimony and requiring the resistance of subpoenas that we've seen in the Macktal and the Polizzi agreements?

Mr. SPENCE. No, sir, to the contrary. The releases and agreements with the former Comanche Peak workers is a part of the $5 million settlement, expressly encourage the workers to bring any safety concerns that they may have to TU Electric, and in no way sacrifices their right to take any safety concerns to the Nuclear Regulatory Commission.

Senator BREAUX. Can you tell the committee why you didn't attempt to include, since you were settling the cases, a restriction on their ability to appear before the NRC or any other Government agency? Why did you not want to try and get in there?

Mr. SPENCE. Well, there's a number of points that should be made in response to that question. And going back to your previous questions, I should point out that there is, just for the record, no relationship whatsoever between the Macktal agreement or the Polizzi agreement to the CASE settlement agreement that led to the dismissal of the ASLB proceeding.

Senator BREAUX. I understand that.

Mr. EDGAR. May I respond, Senator Breaux, on that?

Senator BREAUX. I asked Mr. Spence, if he wants you to, that's fine.

Mr. SPENCE. Sure.

Senator BREAUX. Okay.

Mr. EDGAR. If it would help, I think. You asked a further question that's directly related, which is the connection between the $5.5 and the dismissal.

Senator BREAUX. I want to get into that, but let's take it in the order. I don't want to overlook that. I intend to get into that.

But my question right now specifically is Texas Utilities negotiated two very large settlements and my question is, why in those settlement agreements did Texas Utilities not seek to require some type of restriction on all these people that you were settling with on their ability to testify further regarding safety concerns or any other concern before the Federal agencies?

Mr. EDGAR. We had no intention of doing so. We didn't think it was necessary to do so. And I was a party to that negotiation.

Senator BREAUX. Did you have any legal concerns with the ability to do that?

Mr. EDGAR. With the ability to not include that restriction?

Senator BREAUX. No. Did you have any legal concerns about including that type of restriction in those settlement agreements?

Mr. EDGAR. Quite frankly, Senator Breaux, it never entered my mind.

Senator BREAUX. And for the record, I think it's clear that what we're talking about, the Macktal agreement and the Polizzi agreements were not with Texas Utilities?

Mr. SPENCE. That's correct.

Mr. EDGAR. That's correct.

Senator BREAUX. Now, tell me just for the record, we've looked at their agreements, and I think I understand them, and I think I agree with what you're saying on both of those settlement agreements that you all made. The first settlement with Texas Utilities where you paid out, I think, approximately $4.5 million, was to the CASE organization. And in as simple terms as you can tell us, what did that agreement get you, and what was the issue that prompted their agreement that that money was paid for?

Mr. SPENCE. George?

Mr. EDGAR. I can answer it. The agreements speak for themselves. They're a matter of public record. The $4.5 million was part of the CASE settlement. It was designed to reimburse CASE for its expenses incurred in more than nine years of litigation. What was further considered in that agreement, and this again, is a matter of public record, it's published in NRC's Official Reporter, is a settlement of the licensing case, a dismissal of the licensing case, and in

lieu thereof, a process that placed CASE in the position of being an internal monitor for Comanche Peak safety.

Senator BREAUX. Was this settlement agreement in any way contingent on CASE doing anything else with regard to this other settlement agreement?

Mr. EDGAR. No. The obligations cut only one way. They cut toward TU to make a good-faith effort to settle the worker claims. CASE didn't have to do anything in that connection.

Senator BREAUX. Okay.

The second settlement agreement, would you describe that for me, so that I may understand it, that was the $5.5 million settlement?

Mr. EDGAR. That's what I was talking about when I was talking about the connection, and there's a point of logic here I'd like to emphasize, and if you'll bear with me it really is important.

Parties to a hearing have rights, including the rights to seek dismissal. CASE was a party. Witnesses do not have any such rights. Parties decide who testify. And witnesses have no control over a decision to dismiss a case. CASE, TU, and the NRC staff were the parties to the case, they agreed to dismiss and the ASLB reviewed it and approved it. The workers, and let me reiterate that, the workers who settled their claims at the time of the CASE settlement had no control over the dismissal decision. That's purely CASE's decision.

Senator BREAUX. Were none of those employees participants or litigants in the licensing procedure?

Mr. EDGAR. They had been witnesses some time previously, as Ms. Garde explained. And I think she put it correctly. I wouldn't agree with all of her characterizations, but I certainly agree with the central thrust of her historical discussion, which is all of those concerns had been enveloped and umbrellaed in a massive reverification program. There really wasn't going to be another docket where worker concerns were going to be placed on the docket. It was going to be a technical discussion, or you know, a technical presentation on the reverification program. So Comanche Peak design was a hundred percent reviewed, just rereviewed, massive hardware reinspections, any concerns that may have arisen out of the supposed worker concerns now have built over them an umbrella of assurance. The plant's hardware and design has integrity.

Senator BREAUX. Well, I think that helps immensely. I think that you're to be commended that in all of your settlement agreements with all of these litigants and the CASE organization, and employees, that at no time did you try and restrict their ability to participate or testify, or give information to any of the Federal agencies or did not go into that area at all.

Can you tell the committee, Mr. Spence, what's the current status of your situation with regard to licensing?

Mr. SPENCE. The plant completion work in a physical sense continues on a milestone schedule of completing all physical work sometime later this year. We're continuing to pursue open licensing items with the Nuclear Regulatory Commission in a more or less routine fashion. NRC has a significant presence on site, around the clock, at Comanche Peak, carrying out their activities. And

we're hopeful that the licensing process will complete somewhere near the same time as the physical construction process.

Senator BREAUX. In commending you for your testimony, you had offered as an adjunct a comment on the Macktal settlement agreement. Just for the record, I want to strongly disagree with you in the sense that you point out that Macktal has characterized his contract as a bar against him raising his concerns to the NRC. You say, "The provision does no such thing. The provision does not affect his ability to communicate any concerns to the NRC staff or to the public in general." It's nice that he could go on 14th Street and announce his concerns, but no one would pay much attention to him. Do you not agree that that contract restricted his ability to testify before the NRC as commission, or before the Licensing Board or all of these other areas? Are you telling the committee that he in fact could make a phone call to somebody on the staff that that's sufficient?

Mr. SPENCE. Let me make a couple of points which I believe will be responsive to that question.

In the first instance, yes, the contract does contain a restriction on his voluntary appearing as a witness before the Atomic Safety and Licensing Board, as well as other administrative and legal judicial proceedings that the company or its contractors may be involved in. My view is that that restriction is not an unreasonable restriction. One must keep in mind that at the time of that settlement, as I understand the facts, Mr. Macktal had spent considerable time being interviewed by the Nuclear Regulatory Commission staff concerning his safety concerns. That followed his having brought safety concerns to the SAFETEAM organization on site at Comanche Peak, who's sole function is the independent review and addressing of worker concerns.

I further understand that at the conclusion of those interactions with the NRC staff regarding Mr. Macktal's safety concerns, that he in effect signed a sworn statement saying this is all the concerns, the safety concerns that I know about.

Senator BREAUX. So that agreement doesn't mention anything about that at all, does it?

Mr. SPENCE. Well, those are underlying facts as I understand, underlying to the understanding of the agreement.

Senator BREAUX. Yes, but the agreement doesn't mention that that's all he knew about anything, does it?

Mr. SPENCE. Well, without seeing the part, and hopefully not appearing to be argumentative with the Chairman, at the time the settlement agreement between Brown & Root and Mr. Macktal was entered into, the parties to that agreement, understood that Mr. Macktal had, in fact, brought all of his safety concerns that he was willing to share at that time, in retrospect to the NRC.

Senator BREAUX. Well, let me ask you this question, maybe Mr. Edgar would want to respond also. Does that make any difference, that is, the fact that a person testifies and spends a year talking about safety concerns, does that make a difference if someone then enters into an agreement that restricts his ability to testify voluntarily, or restrict in making him resist a subpoena in the future? Is it sufficient, from your standpoint, to say that well, since he's testified last month, therefore it's all right to pay him a sum of money

to never testify again in the future? What does that have to do with that?

Mr. EDGAR. Well, Senator Breaux, a couple of things here that could help shed some light on it. Mr. Macktal wasn't at the site after the settlement. He was not going to gain any more information about safety concerns than the information he already had at the time of the settlement.

Senator BREAUX. Okay.

On that very point, suppose he had additional things that he gained while he was on the site that had just not been articulated before the proper forum?

Mr. EDGAR. Understood. But you can only go on the basis of the information before you. At the time, everybody thought they had it all. I'll concede to you that Mr. Macktal's testimony today says that he didn't tell everybody all of his safety concerns. He would not have testified before the Licensing Board, apparently. But Senator Simpson's question brought out a good point that in reality that restriction isn't a very big one, because if Mr. Macktal brought his concerns to the NRC staff, then the Licensing Board would probably issue a subpoena anyway and he would still testify.

But beyond that, recognize that there are four or five additional avenues for him to get safety information before the NRC. It is not really just a phone call. There is a very significant structure built out there to capture safety concerns. In the nuclear industry one of the things that happened is that the utilities have had to develop significant structures to encourage the elevation and the airing of safety concerns. At Comanche Peak alone you have—you can walk that site and you'll see on bulletin boards a phone number for a hotline where you can reach the Comanche Peak Quality Assurance Organization, and give your concerns to them. There is another number posted, you can go to SAFETEAM and get a confidential interview and get your concerns investigated and get feedback. You've got a direct right, under the Comanche Peak Corporate procedure to go to TU management. If I'm a worker, I can call Mike Spence and get his attention on it. He's bound by corporate policy.

I can go to the NRC staff, and believe me, this NRC staff is not Region IV, as was earlier suggested. This is a very major site organization. I don't know how many inspectors they have, but most near term operating licenses would have three resident inspectors at most. There are no less than 10 at Comanche Peak. Everything is an open book. You can call the NRC staff on that site, you can go see them and talk to them. In addition, remember someone with worker concerns can take them to CASE. CASE is a presence on that site. CASE is known on that site, and if you bring a safety concern to CASE, they will follow it up. They have the inside access to drive it to conclusion.

Finally, recognize that TU is bound, under the NRC regulations, 50.55(e) in particular, if it receives information about a safety concern, it's got to analyze it. If it's significant, it's got to report it to the NRC staff. So, what I'm trying to say, and pardon me for being a little long winded about it, is there's a whole structure that forces these concerns forward.

Senator BREAUX. With all due respect, Mr. Edgar, four of the five avenues that you mentioned were available for Mr. Macktal, you can have a settlement agreement with Mr. Macktal that he would never talk to any of them, no problem with that.

Mr. EDGAR. Why wouldn't he? He's free to go——

Senator BREAUX. I know that. You're saying he can go to CASE, he can go to all these other places that you said. That's fine. You could prohibit him from doing that, there's no problem with that. But what's illegal is prohibiting him from voluntarily testifying before the NRC, and these other areas. There was a restriction on his ability. They paid him $35,000 to get that restriction. So it's not sufficient, I would argue, to say well, he could have gone to the employee committee, or he could have gone to TU, or he could have gone to CASE—sure, but it's not illegal to tell him he can't even do that. What's illegal is to tell him he can't do that.

Mr. EDGAR. Well——

Senator BREAUX. That's the major point.

Mr. EDGAR. I understand that. And I understand and I respect your opinion on that in terms of your view of the law. I don't share that view of the law. I don't think that the statute is an absolute——

Senator BREAUX. Let me ask you this specific question.

Mr. EDGAR. I think there's room for a balance. And what I was trying to do was point out some of the additional factors that could weigh in that balance.

Senator BREAUX. Okay.

In light of the NRC regulation, and you realize we wouldn't have gotten into any of this, with Texas Utilities, except you included it, because you weren't party to this agreement, but you commented on it. So, anyway, in your opinion, in light of the NRC regulations, in light of section 210 of the Energy Reorganization Act, are you saying that a contract that somebody's paid money for that prohibits ones ability to go to the Nuclear Regulatory Commission is not illegal?

Mr. EDGAR. The way you posed that question, I must agree with you. You said it prohibits him from going to the Nuclear Regulatory Commission.

Senator BREAUX. And did not the Macktal agreement, as you understand it, prohibit him from voluntarily testifying before the NRC Commission or their licensing board?

Mr. EDGAR. No, sir, I'm sorry. It says it prohibited him from testifying before the Licensing Board, which is one organizational element of the NRC.

My point is that I think there's room for a balance. I read the law as encompassing some additional room so that one can weigh the significance to the restriction. I'm not arguing that there isn't a restriction. Furthermore, neither myself nor TU would argue with NRC's recent action in prospectively saying we're not going to do that any more. With the benefit of hindsight, clearly, you wouldn't put that language in the agreement, none of us would.

Senator BREAUX. And you didn't?

Mr. EDGAR. No, sir.

Senator BREAUX. Well, I appreciate it. I really commended you for the type of settlement agreement you negotiated. I think you

did the right thing. You didn't get involved in restricting voluntary testimony or resisting other types of testimony, and I thank you very much. Good luck at the plant.

Mr. EDGAR. Thank you, sir.

Senator BREAUX. This will conclude our hearing today. I think that one thing that is very——

Mr. SPENCE. Excuse me. Could I say one other thing, Chairman Breaux?

Senator BREAUX. Sure.

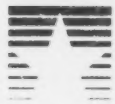
Mr. SPENCE. I said in my opening remarks we appreciate the opportunity to appear here today. Given your compelling interest in the nuclear industry and your specific inquiry as to the status of Comanche Peak, I would like, on behalf of my company, to extend an invitation to you and members of your staff and your subcommittee to come to Comanche Peak and observe firsthand the status of our plant and the processes that we have underway, and we would be most pleased if we could show you our nuclear project.

Senator BREAUX. And we can talk about it when we come back?

Mr. SPENCE. Certainly.

Senator BREAUX. Thank you. We'll hope we'll have a chance to do that.

[A letter from Mr. Spence follows:]



Michael D. Spence
Division President

May 26, 1989

Mr. Paul Chimes
Editorial Director
Committee on Environmental
and Public Works
Room SD-458, Dirksen Building
Washington, DC 20510

Dear Mr. Chimes:

I have reviewed the transcript of my testimony presented to the Subcommittee on Nuclear Regulation on May 4, 1989. Attachment A to this letter contains the corrections necessary to ensure that the transcript accurately reflects my testimony. The corrections contained in Attachment A are minor and typographical in nature.

After presenting this testimony, I have become aware that one of my statements concerning Mr. Macktal's interaction with the NRC staff could be susceptible to misinterpretation and requires clarification. In the hearings, I stated that it was my "understanding that at the conclusion of those interactions with the NRC staff regarding Mr. Macktal's safety concerns, that he in effect signed a sworn statement saying this is all of his concerns, the safety concerns that I know about."

Mr. Macktal did not actually sign a statement that he had disclosed all of his concerns. However, he was subject to extensive questioning during proceedings before the Department of Labor (DOL Case No. 86-ERA-23). While under oath and over the course of a three day deposition, Mr. Macktal was repeatedly questioned about his allegations. He was asked to describe those allegations and whether he agreed with SAFETEAM's resolution of his concerns. He was given every opportunity to raise any other

concerns that he had about the safety of Comanche Peak. Thus, Mr. Macktal has "in effect" signed a sworn statement detailing all of the concerns that he knew about.

Sincerely,

Michael D. Spence

Attachment

Senator BREAUX. This concludes our hearing for today. From the prospective of the Chairman, it's very strong feeling on my part that secret settlements that in any way limit the ability for a witness, an employee, a former employee to testify before any agency of our Government that has jurisdiction in these areas, is contrary, certainly to public policy, and I personally feel are clearly illegal, have been illegal. I do not need the NRC to negotiate for a long period of time to come to that conclusion. I think they have been illegal under the existing statutes, and they are certainly contrary to public policy. I think that is clear from our hearing that the NRC was clearly very lax in scrutinizing these cash settlements. They should have really just thrown them out. They should not have been accepted. They should differ with NRC's interpretation of public policy.

This does not necessarily conclude this committee's interest in this matter. We intend to follow it very, very closely. I think it continues to point out the problem that we have with the Commission, and makes the case even further for an effort to try and move towards a nuclear safety agency with a single administrator.

We thank all of the witnesses, and also all of the participants. The committee is adjourned.

[Whereupon, at 3:42 p.m., the subcommittee was adjourned, to reconvene at the call of the chair.]

[Statements submitted for the record follow:]

TESTIMCNY OF ED SMELOFF
DIRECTOR
SACRAMENTO MUNICIPAL UTILITY DISTRICT

May 4, 1989

Mr. Chairman and members of the Committee, my name is Ed Smeloff and I am a director of the Sacramento Municipal Utility District. I was elected to represent the third SMUD ward in November 1986. I am now the second most senior member of the SMUD Board. And I am the one SMUD Board member who has participated in both the March 22, 1988 and the April 7, 1989 Nuclear Regulatory Commission hearings on the Rancho Seco nuclear generating station.

I am here today, as one member of the SMUD Board, to testify in response to the Subcommittee's concerns about the Nuclear Regulatory Commission's oversight of the Rancho Seco nuclear generating station. The Board as a whole has not adopted a position in response to the questions posed by the Subcommittee. Therefore, I want to make it clear that my testimony represents only my viewpoint of the issues raised.

As I understand it, the Subcommittee is concerned about the manner in which the Nuclear Regulatory Commission addressed issues identified by the Institute of Nuclear Power Operations relating to the operation of Rancho Seco. Specifically, the issues of SMUD's economic incentive resolution and the adversarial debate about Rancho Seco in Sacramento are identified as potentially having an impact upon the safe operation of the plant.

First let me address the economic incentive resolution. It is my view that the Nuclear Regulatory Commission shares responsibility for SMUD's adoption of this policy.

The economic incentive resolution is part of a policy proposed by the majority of the SMUD Board of Directors and adopted by the voters in June 1988. That policy authorized a test run of the nuclear facility for a period of time up to 18 months, to be followed by another vote on whether the plant should continue to operate.

This policy was placed before the voters of Sacramento for ratification as an alternative to a citizen-sponsored ballot measure that would have closed the plant.

The policy stated that SMUD would strive to operate the plant at a 70 percent annual-capacity factor, and that if the plant operated at less than a 50 percent capacity factor for four consecutive months, the plant would be permanently closed unless the Board (by a four-fifths vote) determines

that continued operation is in the best economic interest of the District.

This language was intended to assure the public that the plant would be run economically. In the words of the Board member who authored the policy statement, the economic incentive resolution was "to offer true, secure stopping points from any reckless expenditure of monies."

Following the decision by the SMUD Board of Directors to place this policy statement before the voters, the Board was invited to explain this policy to the Nuclear Regulatory Commission at a March 22, 1988 hearing.

At that meeting with the NRC I testified as follows:

"In order to reassure the voters of Sacramento that these economic consequences (of continued operation) would be minimized, the 50 percent capacity factor criterion was added to the ordinance. It was clear to me that economic criteria were being given priority in determining how much additional resources would be devoted to the nuclear plant.

"Furthermore, no discussion occurred at the time as to what effect giving such a priority to economics would have on the performance of workers at Rancho Seco. There can be no doubt that the language of the ordinance places additional pressure on the workers to keep the plant running in the short run, at the expense of long-term safety. The existence of that pressure has been conceded by Mr. Andognini [the former CEO Nuclear].

"In my opinion, the clause of the ordinance places undue pressure on the Rancho Seco management and workers to meet economic criteria, and could jeopardize the safe operation of the facility."

The only direct response of the Nuclear Regulatory Commission to these comments came from Commissioner Frederick Bernthal.

His response was as follows:

"I have never objected to setting down guidelines for nuclear power plants over relatively long periods of time, and I think a number of state utility commissions and others are doing that.

"By a relatively long period of time I do not mean 18 months. I think that we talked 3-5 years because then you do not get in a situation where you have people and managers with their jobs depending on meeting a certain level of operation, a certain capacity factor. That is the thing that concerns me about what you have done here, and I would

suggest that the Board in its directives to the extent that you are able now, consistent with the action you have taken, get on the record and make it very clear to the managers of the plant and to Mr. Andognini and others that they are to run the plant in a way they feel is consistent with public health and safety and in no other way.

"I don't quite know how you undo the fact that the proposition is now on the ballot, but I do want to make it very clear that short term capacity factor goals, I think, by and large are not a good idea."

Mr. Bernthal's comments were thoughtful. But the Commission did not act upon them. At the time of the Commission hearing, the measure could have been removed from the ballot by the request of the SMUD Board. Even afterwards, the Board retained the legal authority to modify the policy statement.

Clearly, the SMUD Board was careless in drafting a policy on economic performance for the plant. The policy was hurriedly drafted without consulting experts in the field. The Nuclear Regulatory Commission also shares in the responsibility for this policy by not providing a clear statement of their view related to the economic incentive resolution.

The second issue of concern identified in the Subcommittee's letter is the adversarial debate about Rancho Seco in Sacramento and the effects this environment has on the employees at the plant. The concern about this issue is identified in INPO's letter of April 4, 1989. In that letter INPO described a "uniquely troublesome environment" created by some actions of the SMUD Board. INPO identifies several specific actions it believes to be the cause of performance problems at the plant. INPO admits that the observations about Board actions are "subjective in nature and are not as readily documentable."

While it is my impression that INPO has done a thorough job of identifying technical problems at Rancho Seco, I believe that their comments related to governance at SMUD have been made without a thorough investigation of the facts. Nonetheless, the general thrust of their comments are important and deserve serious consideration.

INPO criticizes the "board's frequent practice of making decisions by three-to-two votes." This observation is simply not accurate. Of 35 key decisions on Rancho Seco made in the past two years only one was made on a three-to-two vote (see the attached list of votes). INPO's concerns about follow-up comments also are not supported by a review of the facts.

Another INPO concern is that "Board meetings and meetings with individual board members take up an excessive amount of senior management time." Again, I do not believe this conclusion is supported by the facts. The Board conducts its business through two monthly meetings and meetings of four committees. The Board established a special Rancho Seco committee in 1986 to review the restart program. Management has consistently supported the work of this committee and has never expressed concerns about the amount of time required to staff the committee. It is my view that strong Board oversight is essential to improving the operation of Rancho Seco.

INPO also notes in its letter that "Board meetings are often excessively adversarial." Board meetings are public and controversial issues are debated by the Board. This is not unusual among elected bodies. Under most circumstances vigorous debate followed by decision making does no harm.

However, last year the firing of SMUD's general manager by the majority of the Board did create an excessively adversarial environment in the community. The three-to-two vote to fire the general manager was viewed by many in the community as a breach of public trust and destructive behavior (see the attached articles).

The departure of the general manager along with the chief executive of the nuclear plant who resigned at the same time contributed to a decline in the improved performance at the plant. Since December 1988, the plant has operated at less than a 40 percent capacity factor.

Following the former general manager's departure there was substantial negative press coverage about secret salary increases, bonuses and perquisites for SMUD employees, and excessive use of contractors and consultants. The airing of these problems in the local print media and local television undoubtedly harmed employee morale at the plant. However, the alternative of secrecy and silence for a publicly-owned utility is unacceptable.

In my judgment, the important issue that arises out of the set of concerns expressed by INPO in its April 4 letter is how does SMUD and the NRC assure that safety is not compromised in the highly-politicized environment that has been created by the upcoming vote on the future of the nuclear plant.

To protect their jobs many of the plant employees are taking an active role in the campaign on the ballot measure. The chief executive of nuclear operation commented on this situation at the April 7, 1989 hearing of the NRC. He said, "We don't enjoy the luxury of being an investor-owned utility where the utility can invest their money to have

publicly paid ads to talk about their nuclear power plant. We have to do that with employee contributions and our employees have made those contributions. Our employees have made telephone calls, our employees walk the community, our employees give speeches in the community about Rancho Seco. We have had to carry the load in that perspective."

It should be clear from that statement that the June referendum weighs heavily on a lot of people at Rancho Seco. Given the recent three incidents shutting down the plant, there is without doubt enormous pressure to show that the plant can be productive through the remainder of the time prior to the election. The potential for employees to be pressured to keep the plant operating even during adverse circumstances is high. The next five weeks before the June election will be a critical time for the safe operation of the plant. Both SMUD and the NRC need to be extra vigilant during this period of time.

To conclude, it is my view that what has occurred at Rancho Seco recently points out two important challenges to the nuclear industry.

The first is to accommodate the interest that publicly-owned utilities and state utility commissions may have to use economic criteria to protect ratepayers from the unproductive performance of a nuclear plant without placing undue pressure on plant management and employees to operate the plant in an unsafe manner.

The second is to reconcile the public's right to vigorously debate the economics of a nuclear plant with the need to provide a stable working environment at the plant.

These are difficult challenges. I hope that our experience in Sacramento can be helpful to this Subcommittee and to the Nuclear Regulatory Commission in shaping policies to assure that nuclear energy is used in a safe manner.

1987

RANCHO SECO RELATED VOTES

ITEM	DATE	RESOLUTION NUMBER	VOTE Aye	No	Abstain	Absent
1987 Rancho Seco Business Plan	1/22/87	87-1-36	4	0	Smeloff	
Revising delegations of authority for Rancho Seco restart	2/5/87	87-2-10	5	0		
Establishing non-civil service positions for 4 nuclear directors	3/19/87	87-3-25	3	0		Kehoe Wilcox
Approving delegations of authority	4/16/87	87-4-55	4	1	Taylor	
Appointment of AGM Nuclear Power Production	4/16/87	87-4-41	4	0		Koehler
Appointment of George Coward as AGM Nuclear Technical & Administrative Services	5/7/87	87-5-19	4	0		Kehoe
Appointment of Carl Andognini as CEO, Nuclear	5/7/87	87-5-20	4	0		Kehoe
Amending resolution relating to employment of Joseph Firlit	5/7/87	87-5-21	4	0		Kehoe
Appointment of 4 Nuclear directors and authorizing contract with AGM, Nuclear Technical and Administrative Services	5/21/87	87-5-53 87-5-54 87-5-55 87-5-56 87-5-57	3	0		Kehoe Wilcox
Amending delegations of authority	6/18/87	87-6-25	4	0		Kehoe
Creating non-civil service position of Director, Nuclear Quality Assurance	6/18/87	87-6-29	4	0		Kehoe
Report on financial implications of revised 1987/88 nuclear expenditures and the new restart program	7/2/87	87-7-13 87-7-14	3 3	1-Koehler 1-Koehler		Kehoe Kehoe
Proceed with Rancho Seco restart program	7/2/87	87-7-11	4	0		Kehoe
Revising 1987 budget to incorporate current purchase power and Rancho Seco projections	7/16/87	87-7-30 87-7-31	3 4	1-Smeloff 0		Kehoe Kehoe
Appointment of John Vinquist as Director, Nuclear Quality Assurance	7/16/87	87-7-32	4	0		Kehoe
Requesting Board to determine an emergency exists and to approve negotiation for purchase on open market of CPU for Rancho Seco	8/6/87	87-8-6	4	0		Kehoe
Resolutions commending CEO, Nuclear and staff for efforts on restart program	12/3/87	87-12-12	4	0		Kehoe
Authorizing CEO, Nuclear to execute service agreements through June 1988	12/17/87	87-12-23	5	0		

1988

RANCHO SECO RELATED VOTES

ITEM	RESOLUTION DATE	RESOLUTION NUMBER	VOTE Aye	VOTE No	VOTE Abstain	VOTE Absent
Establishing 1988 salary increase for CEO, Nuclear	1/7/88	88-1-17	3	2-Smeloff -Kehoe		
Authorizing renewal of lease with Fruitridge Joint Venture for warehouse space for Rancho Seco storage	1/7/88	88-1-12	5	0		
Referendum on restart of Rancho Seco - Rancho Seco Utilization Ordinance	3/3/88	88-3-11	4	1-Smeloff		
Declaration that safety will be primary consideration in operation of Rancho Seco	3/17/88	88-3-34	5	0		
Extending lease for 16 trailers at Rancho Seco	3/17/88	88-3-26	5	0		
Exempting position of Manager, Nuclear Security from civil service status	5/19/88	88-5-16	5	0		
Agreement with Carl Andognini	6/16/88	88-6-17	4	1-Smeloff		
Agreement with Joseph Firlit	6/16/88	88-6-18	4	1-Smeloff		
Authorizing contract to Roebbien Engineering for construction of Rancho Seco Technical Center	7/7/88	88-7-21	5	0		
Extending until 12/31/88 the delegation of authority to the CEO, Nuclear needed to facilitate the restart of Rancho Seco provided the expenditures do not exceed the amounts provided for in the budget	7/7/88	88-7-20	4	0		Kochler
Authorizing contract with NFS Energy Services for prime maintenance and construction services	8/4/88	88-8-10	4	0		Kehoe
Reject only bid received for spare replacement motor for Rancho Seco auxiliary feed and authorize GM to negotiate replacement	8/4/88	88-8-3	4	0		Kehoe
Exempt 7 nuclear manager positions from civil service	9/1/88	88-9-8	5	0		
Exempting position of Manager, Nuclear Human Resources from civil service classification	9/15/88	88-9-13	4	0		Taylor
Authorizing indemnity agreement covering INPO officials for liability in excess of $15 million	10/6/88	88-10-25	5	0		

OPINION

The Sacramento Bee

Locally owned and edited for 131 years

JAMES McCLATCHY, *editor, 1857-1883*
C K McCLATCHY, *editor, president, 1883-1936*
WALTER P. JONES, *editor, 1936-1974*
ELEANOR McCLATCHY, *president, 1936-1978*

C K McCLATCHY, *editor*
GREGORY E. FAVRE, *executive editor*
PETER SCHMAC, *editorial page editor*
FRANK B. J. WHITTAKER, *general manager*

SMUD's destructive majority

The dismissal, by a bizarre 3-2 vote, of Richard Byrne as general manager of the Sacramento Municipal District presents the district with what may be its most serious crisis yet.

Having assured voters during the campaign to keep Rancho Seco running that SMUD was committed to preserving stable, competent and professional management, board members Ann Taylor, Cortus Koehler and Cliff Wilcox have broken faith and plunged SMUD into new turmoil and uncertainty. The consequences of that aren't just a concern for the Nuclear Regulatory Commission and the investment community but for every ratepayer and voter in this region.

In November, Sacramento will have the opportunity to elect a new majority on the SMUD board. It is now more vitally important than ever before that the leaders of business and government, educators, working men and women and everyone else with a stake in the future of Sacramento find candidates with the ability and the vision to save the district.

That's not going to be an easy task. The controversy over Rancho Seco has left the community deeply divided. There is a grave risk that the election in November will turn into a reprise of the one just finished, with slates of pro- and anti-nuclear ideologues competing for the voters' support. To perpetuate those divisions will only make matters worse. The only issues in the election of a new SMUD board should be competence, integrity and a sense of responsibility to the public.

In the interim, the district will have to find a way to muddle through. David Doggs, named by the board as Byrne's successor, is an able administrator who has served this community well in his former position with Regional Transit. But he does not have the experience or the familiarity with the complexities of rate setting, transmissions and nuclear operations that are essential to dealing with the district's most important problems. Under the present circumstances, he is therefore going to need all the support the community can provide.

The board's action this week will not make Doggs' task any easier. Byrne's dismissal suggests that the board intends to run the district itself and will not tolerate the kind of openness and candor that truly professional leadership could — and under Byrne did — provide.

As a result, Doggs may face his severest test in just trying to protect the district's integrity until November, when there will be a chance to install a new majority on the board. In the weeks ahead, the district will have to complete the negotiations of the transmission agreements for backup power from other suppliers, which will be vital to the community's economic prosperity if Rancho Seco fails again. In addition, some members of the board can be expected to try to use the chaos they have created this week as a pretext for carrying through on their plans to turn over the operation of Rancho Seco to the Duke Power Company. That would be a monumental error, undermining the most important elements of public control.

This community fought for 40 years to create its own, independent municipal utility district. It has served the community well. It's imperative to make the district whole again.

The Sacramento Union

THE OLDEST DAILY IN THE WEST
FOUNDED • MARCH 19, 1851

Richard M. Scaife Publisher Inc.
Publisher
John D. Bates
President and General Manager
James F. Vesely
Editor

Editorials

Meltdown at SMUD

Just after voters gave the SMUD Board of Directors a chance to get its act together, it had to go and do something stupid.

By ramming through a series of executive changes headed by the dismissal of General Manager Richard K. Byrne, a three-member majority of the Sacramento Municipal Utility District board has inevitably shaken community confidence anew in the overall management of the publicly-owned utility.

As one of the board dissenters, John T. Kehoe, said, it was "a tragic error."

Just 10 days ago, voters narrowly rejected a ballot measure that would have permanently shut down SMUD's Rancho Seco nuclear plant and approved a proposal to give the facility an 18-month trial. Following that measured vote of confidence, SMUD officials proposed a revised budget calling for an 8.35 percent rate increase in October and another 8.35 percent hike in 1989. These jolts to ratepayer pocketbooks would come in the wake of rate increases totaling 80 percent in the past three years.

The increases would not be greatly out of line if ratepayers could reasonably expect that they would result in Rancho Seco achieving its potential of providing more than half of the utility's electricity, plus a surplus that could be sold outside the district. But such optimism could only be based on restored confidence in a Board of Directors that in recent years has established a revolving door of top managers and stuck its fingers in day-to-day operations — an overall performance that prompted bond rating agencies to downgrade the utility's ratings several times.

SMUD directors Ann L. Taylor, Cortus T. Koehler, and board President Clifford R. Wilcox voted to terminate Mr. Byrne's contract, while Director Ed Smeloff joined Mr. Kehoe in supporting the general manager.

Mr. Byrne's ouster was seen as resulting for the most part from his refusal to back off from a recommendation that the utility would be better off economically if Rancho Seco were permanently shut down. Mr. Kehoe, for one, cited this factor in discussing the reasons for Mr. Byrne's dismissal.

This newspaper disagreed with Mr. Byrne's Rancho Seco position, but respected his integrity for standing by his recommendation. We believe Mr. Byrne would have been a strong leader during the crucial 18-month Rancho Seco trial period, and that he would have provided dedicated leadership for the utility.

The removal of Mr. Byrne sends an unfortunate message to the rest of the public utility field that it's more important for SMUD executives to be sensitive to political winds blowing from the SMUD board than for any technical expertise they might possess.

So now, in a discordant game of musical chairs, Mr. Byrne is out, SMUD chief operating officer David Boggs, former Regional Transit boss, is in as general manager; nuclear chief Carl Andognini has resigned and will become a special consultant to SMUD until the end of the year; and Mr. Andognini's assistant, Joseph Firlit, becomes nuclear chief.

Do we hear a motion to turn SMUD back to PG&E?

-The Sacramento Union, Saturday, March 19, 1988

Rancho Seco measure is flawed, critic says

By ANNE HELLER
SACRAMENTO UNION STAFF WRITER

A referendum to give Rancho Seco an 18-month trial run is fatally flawed and should be removed from the June ballot, the chairman of Sacramentans for Safe Energy said Friday.

Measure C contains a provision that literally prohibits SMUD from closing the nuclear power plant for safety reasons, SAFE chairman Michael H. Remy said.

The provision says Rancho Seco shall not be closed unless the Nuclear Regulatory Commission determines the plant is unsafe or the SMUD board decides it is not economically viable.

But the measure fails to include a provision allowing SMUD directors or their staff to close the plant for safety reasons, Remy said.

SAFE is prepared to take Sacramento Municipal Utility District directors to court if they do not move to withdraw the measure, Remy said.

The referendum, put on the ballot by SMUD directors, has drawn intense scrutiny from the Nuclear Regulatory Commission.

The commission summoned the five SMUD directors to Washington, D.C., Tuesday to address concerns about the board's commitment to safety.

The NRC is scheduled to consider approving the restart of the long-idled reactor at the Tuesday meeting.

SMUD directors, trying to allay regulators' concerns, adopted a resolution this week emphasizing that safety is their primary consideration.

"They're grabbing at straws," said SMUD Board President Clifford R. Wilcox, in response to Remy's statements.

"I don't care what's in that ordinance. There's no way we'll operate that plant if it's unsafe," Wilcox said.

Director John T. Kehoe, who authored Measure C, said the board has 'meategorically stated we will not allow (the plant) to run unsafely. I don't think there is anything in conflict here at all."

Kehoe added he has no intention of removing the measure from the ballot.

Director Ed Smeloff, the only board member who opposed putting the referendum on the ballot, said the measure is "filled with problems."

"It was a last-minute ordinance that wasn't thought through very well," Smeloff said.

Because SMUD has the primary responsibility for safety, Smeloff said a measure prohibiting the utility from closing the plant for any reason except economic considerations, "may be a violation of our (operating) license."

However, SMUD attorney David S. Kaplan said "practically speaking, this ordinance does not prevent the board from closing the plant down for safety reasons."

"If it's enacted, the public health and safety will be thoroughly protected," Kaplan said.

STATEMENT

SUBMITTED BY

THE UNITED STATES NUCLEAR REGULATORY COMMISSION

TO THE

SUBCOMMITTEE ON NUCLEAR REGULATION

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

CONCERNING

(1) AGREEMENTS RESTRICTING INFORMATION

FLOW TO THE NRC AND

(2) RANCHO SECO

NUCLEAR GENERATING STATION

FOR THE

NUCLEAR REGULATORY COMMISSION

PRESENTED BY

LANDO W. ZECH, JR.

CHAIRMAN

SUBMITTED: MAY 4, 1989

Mr. Chairman and members of the Subcommittee, the Commission is pleased to appear before you. As you are aware, Commissioner Carr is unable to be here today. We are here to discuss legal and policy implications of settlement agreements affecting the ability of persons to testify before the Nuclear Regulatory Commission. We shall also address the recent restart of the Rancho Seco plant.

With regard to the matter of settlement agreements, we would like to turn directly to the two specific issues the Subcommittee asked the Commission to address. The first is whether current law permits NRC licensees, license applicants, or contractors thereof to enter into agreements with employees or former employees whereby, in exchange for financial consideration, the employee or former employee agrees to restrictions upon his or her ability to testify or participate in proceedings under the Atomic Energy Act. The second issue is whether such agreements, even if they are legal, are good public policy.

With regard to settlement agreements, the Commission wishes to emphasize that it strongly supports the widely-accepted general policy favoring settlement of disputes by the affected parties in adjudicatory proceedings. Settlement agreements that minimize or avoid the need for expensive and time-consuming litigation are in the interest of all parties and, therefore, desirable. For this reason, such agreements are normally to be encouraged. In fact, NRC

regulations encourage fair and reasonable settlements of contested issues. See 10 CFR § 2.759; see also 10 CFR § 2.203. However, to provide some assurance that settlement agreements will meet NRC standards, all settlements of issues raised in NRC proceedings must be approved by the presiding officer. This was done in a stipulation agreement agreed to by Texas Utilities Electric Company, intervenor Citizens Association for Sound Energy (CASE), and the NRC staff in which these parties asked the presiding licensing board to dismiss the Comanche Peak operating license proceeding. That agreement specifically provided that parties could bring any safety issue to the NRC.

Nevertheless, not all agreements affecting the ability of an individual to provide safety information to the NRC would necessarily come before the NRC for review and approval. The settlement agreement between Joseph Macktal and Brown & Root is, of course, an example. This confidential agreement was intended to settle a Section 210 proceeding before the Department of Labor. Since Mr. Macktal was not a party to or otherwise a participant in an NRC proceeding, his settlement agreement in the Section 210 proceeding before the Department of Labor proceedings did not come to the NRC for its review. There was, therefore, no opportunity for the NRC to ensure that Mr. Macktal understood that he could come directly to the NRC staff or the Commission itself with any safety concern.

It should be noted, however, that the NRC has taken actions over approximately the last nine months to address the question of Mr. Macktal's additional safety issues. In late September 1988, in spite of his numerous contacts with the NRC, we received information indicating that Mr. Macktal had not provided NRC

with all his safety concerns. That information came in the form of an affidavit by Mr. Macktal attached to a pleading filed by Citizens for Fair Utility Regulation. To the extent Mr. Macktal's affidavit provided enough specificity, the technical staff began reviewing his allegations to determine if additional staff work was needed to address the allegations. On December 21, 1988, the Commission issued CLI-88-12, which clearly indicated that the NRC did not view the settlement as prohibiting Mr. Macktal's raising safety concerns with NRC. Although Mr. Macktal's attorneys were aware of this decision, and in fact have filed pleadings addressing that decision, Mr. Macktal did not bring his concerns to the NRC after the Commission gave its view that he was permitted to do so. After attempts to contact Mr. Macktal directly and through his attorneys, late last week the NRC staff was able to reach Mr. Macktal. Although he indicated that he did have safety concerns, he declined to provide the NRC with them at this time, but instead referred the staff to his attorneys. The NRC is currently working with Mr. Macktal's attorneys in an attempt to find out what, if any, additional safety concerns he has.

Obviously, the Commission is concerned with preserving its access to information bearing on its safety responsibilities, and we have initiated actions to assure that settlement agreements do not impermissibly burden the Commission's access to information or a person's ability to communicate with respresentatives of the Commission.

The staff has issued a generic letter to chief executive officers of the major licensees of the Commission and their principal contractors on the subject

(copy attached as Enclosure). Among other things, this letter requests licensees to examine current and previous settlement agreements with employees, and contact those employees as appropriate to ensure the employee or former employee understands that he or she may freely come to the NRC at any time without fear of any form of retribution. In appropriate situations the staff will contact the individual involved to determine whether he or she has any unresolved safety concerns.

Additionally, we are considering changes in our regulations to specifically require that such settlement agreements must provide an opportunity to the settling parties to bring safety issues directly to the attention of the Commission. The Commission is writing to the Secretary of Labor on this issue and we are attempting to determine if there are other settlement agreements under Section 210 of the Atomic Energy Act with potentially unacceptable conditions. The Department of Labor is, of course, responsible for the administration of the employee protection provisions of the Act and possesses the ultimate authority to approve settlements in cases brought before it.

To remove any possible uncertainty about the agency's position, let me state emphatically that an agreement whereby any person--not just an employee or former employee with pending claims under Section 210 of the Energy Reorganization Act, but any person--contracts to withhold safety-significant information from the Nuclear Regulatory Commission is not acceptable.

The Macktal settlement agreement did not appear to go this far, for on its face it did not preclude Mr. Macktal from bringing his safety concerns to the

attention of the NRC. Mr. Macktal did agree, however, not to appear voluntarily as a witness or a party in licensing proceedings involving Comanche Peak and to take reasonable steps to resist compulsory process. In an instance such as this, we at the Commission need to ensure that an individual who has entered into a settlement agreement always has an opportunity to bring safety concerns to the attention of the Commission. We think that the revised procedures that we are considering will address this concern.

The Commission believes that such agreements must provide an opportunity to the settling parties to bring health and safety concerns directly to the attention of the Commission in order to be consistent with the policies underlying the Atomic Energy Act and the Energy Reorganization Act. The question of whether such agreements are actual violations of law depends largely on the specific circumstances surrounding the agreements.

It is difficult, however, to talk entirely in the abstract about agreements restricting participation in NRC proceedings, because a variety of agreements that meet that description can be imagined. Not all of these are necessarily objectionable. For example, an agreement to settle litigation before the agency might reasonably involve a commitment by a party not to attempt reopening the supposedly settled issue. If the facts have been exhaustively explored and the settlement is based on actions that adequately address the safety concerns, such an agreement could be no more than a lawyer's normal precaution, not prejudicial to the Commission's authority under the Atomic Energy Act. At the other extreme, however, a paid-for confidential commitment

by an individual not to raise safety concerns with the NRC in any fashion is intolerable.

Whether or not restrictive agreements violate a statute or regulation on their face, a compelling case can be made that such agreements must provide an opportunity to the settling parties to bring safety issues directly to the attention of the Commission. For example, judicial decisions hold that a person may not waive rights to bring employment discrimination charges before the Equal Employment Opportunity Commission. EEOC v. Comsair, Inc., 821 F. 2d 1085 (5th Cir. 1987); EEOC v. U.S. Steel Corp., 671 F. Supp. 351 (W.D. Pa. 1987).

Precisely how these matters might bear on the legality of the Macktal agreement and which way any balance of public interest versus private convenience might tip are matters which I understand are presently before the Department of Labor in Macktal v. Brown & Root [Case No. 86-ERA-23], As I noted earlier, the Department of Labor is the responsible decider of claims under Section 210 and settlements thereof. In pleadings filed in that proceeding I understand that a number of issues have been raised concerning the purpose of the agreement and how it was perceived by the parties. These factual considerations go well beyond an analysis which would focus solely on the question of the legality of the words of the agreement itself. In view of the questions which are now before the Department of Labor in Section 210 proceedings, I do not believe that the Commission should express a view on how the case should be decided. For this reason, in its order of April 20, 1989, the Commission went no farther than withdrawing its remarks made in a previous order about the acceptability

of the Macktal agreement. [In the Matter of Texas Utilities Electric Co., CLI-89-06].

Finally, as I have said, the agency is now actively reviewing our directives in this area and will make changes in them if necessary. The objective of this effort is to leave no uncertainty that parties to settlement agreements understand that they have the opportunity to provide information directly to the Commission.

I can assure you, and any persons who may be contemplating such agreements, that the Commission will give close attention to these arrangements.

An now, with your permission, we would like to discuss the operations of the Rancho Seco Nuclear Generating Station.

Concerns about Rancho Seco/SMUD

Mr. Chairman, on April 12, 1989 you expressed your concern over the actions of the NRC in response to the April 4, 1989 letter from the Institute of Nuclear Power (INPO) regarding the operation of the Rancho Seco Nuclear Generating Station. First, let me explain the background of the events before and subsequent to that letter.

The Executive Director for Operations (EDO) and I first were made aware of INPO's concerns about the actions of the Sacramento Municipal Utility Districts (SMUD) Board of Directors on April 3, 1989. I notified my fellow Commissioners

and it was agreed that it was advisable to request that the plant, which was not operating at the time, remain shut down until the Board of Directors could respond to INPO's issues. The utility agreed to remain shut down and the Commission directed on short notice that the SMUD Board of Directors come to Washington for a public meeting. On April 7, 1989 the Commission met with the SMUD Board of Directors and utility senior management responsible for Rancho Seco as well as senior NRC officials cognizant of the plant to address the issues raised by INPO.

Based on our review of the available information, the presentations we heard at the April 7, 1989 meeting, and the continued close monitoring of the NRC staff, the Commission did not object to the resumption of power operations at Rancho Seco. More specifically, this judgement was based on the following considerations:

1. The main concern expressed by INPO in the April 4, 1989 report was that the Board governance of Rancho Seco could have an impact on continued safe operation of the plant. Mr. Pate's April 4, 1989 letter to me stated, "While the letter points out serious concerns with the long term governance of the District's nuclear program, I do want to emphasize that, at the present time, plant personnel are especially cautious and conservative due to attention by the NRC and due to a strong focus on safety by the management team. We therefore believe that our concerns need to be addressed, not as an immediate crisis, but rather over the coming months to assure long term improvements and consistent performance at the Rancho Seco Nuclear Generating Station."

2. All SMUD Board members reaffirmed their commitment to operate Rancho Seco safely.

3. Senior management responsible for operation of Rancho Seco stated they felt they are getting the adequate support they need to operate Rancho Seco safely and believe Rancho Seco can continue to be operated safely.

4. The NRC staff reaffirmed their belief that plant upgrades were effective and operations had improved substantially since the March 1988 restart. Also, the staff planned continued augmented inspection coverage of Rancho Seco at least through June 1989 when the immediate future of Rancho Seco will be determined by local voters. This should assure that no potential safety concerns go unrecognized.

The detailed issues discussed by INPO were regarded as potential safety concerns deserving serious and thorough NRC review. The issues had previously been extensively evaluated by the NRC in conjunction with an overall performance improvement program that began at Rancho Seco after an NRC-imposed plant shutdown on December 26, 1985. Our ability to quickly evaluate INPO's concerns was possible because of past and continuing NRC evaluations of Rancho Seco's operating difficulties. We concluded, as did INPO, that there were no immediate safety concerns at Rancho Seco.

As requested by your letter of April 21, 1989, we will now provide a more detailed response to the following issues: (1) the NRC's view of the safety of

Rancho Seco, (2) the INPO report and the criticisms therein, and (3) the safety impact of the economic incentive resolution.

(1) NRC View of the Safety of Rancho Seco

On March 28, 1989, the NRC issued the Systematic Assessment of Licensee Performance (SALP) report for Rancho Seco that rated its performance for the period of July 1, 1986, to December 31, 1988, as satisfactory. The SALP report noted that the December 12, 1988 steam generator dry out event and the January 31, 1989 auxiliary feedwater system overpressurization event were exceptions to an otherwise strong record of careful operation and testing since restart.

Although SMUD's performance does have some weak areas, which the NRC has emphasized and which continue to be followed up in the inspection program and in management meetings to evaluate progress, performance in all areas is considered acceptable. The areas that call for improvement include communication and decisionmaking among mid-level and upper-level plant managers and greater use of the problem-reporting mechanisms by employees.

The NRC's oversight coverage of Rancho Seco has been extensive and multi-faceted. In 1988, Rancho Seco was one of the most extensively inspected nuclear plants in the country (10,750 inspection hours versus an average of 4,960 inspection hours). Since 1986, more NRC resources (in terms of staff-hours) have been expended on Rancho Seco than on any other reactor in the country. The NRC has assigned three full-time Resident Inspectors

to Rancho Seco since mid-1986, one more than normal for a single unit site. Backshift coverage has been extensive, including several periods of 24-hour coverage.

In addition, extra project management, inspection, and technical review resources have been used. Finally, a series of major team inspections of Rancho Seco began in 1987 to ensure its readiness for restart and the power ascension testing program. The most recent major team inspection was the maintenance team inspection completed in February 1989.

The level of effort peaked just before restart in March 1988 but is still maintained at approximately twice that of other single-unit plants regulated by the NRC.

(2) The INPO Report and Criticisms Therein

The INPO report expressed concern over the governance of Rancho Seco by the SMUD Board of Directors. INPO's concern was based on the following factors: (a) The history of overall performance of the Rancho Seco nuclear station; (b) The pattern of troublesome operational events at the Rancho Seco nuclear station; (c) The excessive turnover in senior management positions that has occurred in recent years and that appears to be continuing; (d) The difficulty the company has experienced and continues to experience in attracting and retaining nuclear management talent; (e) The pattern of actions/decisions by the Board of Directors, and by individual members of the board, that have led either directly or indirectly to the problems described in (a) through (d) above.

2. (a) The history of overall performance of the Rancho Seco nuclear station.

The NRC agrees that the Rancho Seco performance indicators, as illustrated by INPO in Attachment 1 to their report of April 4, 1989, suggest some areas of weak performance compared to the industry average for operating plants. However, the NRC has monitored overall performance very carefully and has concluded that it has greatly improved over past performance and that all areas represent at least SALP category 2, which is good performance. As we indicated earlier, the NRC continues to maintain an enhanced monitoring program to assure there is no degradation of safe operation.

2. (b) The pattern of troublesome operational events at Rancho Seco nuclear station.

The pattern of troublesome events that are described by INPO was not overlooked by the NRC. The history of poor performance at Rancho Seco led to an NRC-imposed plant shutdown on December 26, 1985, and a

subsequent 27-month comprehensive plant upgrade program. Since plant restart in March 1988, operations at Rancho Seco have improved substantially. Only the two events identified in the SALP report detracted from an otherwise strong operating record since the March 1988 restart. The licensee's response to both of these events also indicates substantial improvement in management and engineering performance over the last 4 years.

The NRC has thoroughly reviewed each event since the March 1988 restart and determined that the events were handled in a safe and conservative manner with appropriate compensatory actions, where required.

2. (c) The excessive turnover in senior management positions that has occurred in recent years and that appears to be continuing.

The NRC considers the turnover since the March 1988 restart to be moderate. There is no question that turnover and personnel changes have occurred. However, the licensee for Rancho Seco, to date, has maintained an adequate and qualified staff. The NRC is closely monitoring plant staffing to assure that sufficient technical strength is maintained.

2. (d) The difficulty the company has experienced and continues to experience in attracting and retaining nuclear management talent.

Management has changed significantly because of promotions and subsequent reorganization, rather than losses (although the Engineering and Procurement Managers have left). Reliance on contractors in management has declined since restart.

Difficulty in attracting new personnel can be expected until after the June 1989 election when the immediate future of Rancho Seco should be determined.

If the licensee for Rancho Seco cannot comply with the staffing levels and qualifications dictated by their license, the plant is required to halt operation. The NRC will continue to watch for more subtle changes and take additional compensatory measures, as required.

2. (e) The pattern of actions/decisions by the Board of Directors, and by individual members of the board, that have led either directly or indirectly to the problems described in (a) through (d) above.

The NRC recognizes INPO's concern about 3-2 board votes; however, we would expect that the members of governing bodies would frequently have differing opinions. Generally, a diversity of knowledge and experience is expected from elected board members and can be healthy when well-managed. The INPO report indicated there were adversarial meetings and individual Board members were frequently critical of policies concerning nuclear programs. We believe that this can and

should be controlled to be consistent with the Board's desire to assure safe operation. To date the votes fully support the commitment by the SMUD Board for safe operation. The Board's unanimous support for safety was reaffirmed in its April 7, 1989 meeting with the Commission.

(3) The Safety Impact of the Economic Incentive Resolution

The Commission does not generally favor economic incentives that are specifically tied to performance criteria.

The economic incentive resolution of concern is SMUD Ordinance No. 88-1, "The Rancho Seco Utilization Ordinance," in particular paragraph 2 which states:

> "2. The Sacramento Municipal Utility District must strive to achieve an annual performance goal of seventy percent (70%) capacity factor in the operation of the Rancho Seco Nuclear Generating Station beginning with the month that the plant achieves full power, and, if at any time after December 31, 1988, the performance level falls below a fifty percent (50%) monthly capacity factor for four successive months, then the plant will be permanently closed unless the Sacramento Utility District Board of Directors determines by a four-fifths vote that continued operation is in the best economic interest of the District."

A number of nuclear power plants across the country are subject to various types of economic incentives to operate. These incentives can be overt, such as the Rancho Seco utilization ordinance, or the more prevalent performance-based rates of return. But even in the absence of overt incentives, every plant is subject to economic incentives for operation. The NRC expects licensees, in particular senior management, to take effective steps to ensure that these economic incentives never displace safety as the first and foremost consideration in questions of plant operation. NRC inspections and periodic management meetings monitor these efforts to ensure that these expectations are satisfied.

On the basis of:

(1) the commitment of the SMUD Board that safety has been and will continue to be the first and foremost consideration in the operation of Rancho Seco;

(2) the commitment of senior management responsible for operating Rancho Seco to take all necessary steps and precautions to ensure that Rancho Seco will not be operated if it is not safe to do so; and

(3) our enhanced inspection coverage of Rancho Seco

we are satisfied that the Rancho Seco utilization ordinance has not resulted in a reversal of priorities by SMUD employees. To ensure that concern for safety is first and foremost in all decisions, the NRC will continue to devote

additional resources to Rancho Seco, including three full-time Resident Inspectors.

Conclusion

Since the March 1988 restart, the NRC has been satisfied that plant upgrades were effective and that operations at Rancho Seco have improved substantially. Only two events detract from an otherwise impressive record of safe operation since the March 1988 restart, and these events were handled well by the licensee. We are very much aware of the uncertain future of Rancho Seco and the resultant stress on plant workers. Our augmented coverage of will continue at least through the June 1989 election when the immediate future of the plant should be determined. The stressful environment for Rancho Seco workers has not resulted in unsafe nuclear plant operations and the Commission concludes that Rancho Seco has been, and can continue to be, operated safely.

This completes our testimony. We shall be pleased to answer any questions you may have.

May 4, 1989

TESTIMONY OF JOSEPH J. MACKTAL
BEFORE THE SUBCOMMITTEE ON NUCLEAR REGULATION

My name is Joseph James Macktal Jr. I have been married for 27 years and have two children. My family and I reside in a rural community less than 15 miles from the Comanche Peak site.

I began work at Comanche Peak in 1985 as an electrical foreman. As work at Comanche Peak progressed, I became distraught over the design and construction of the plant. My fear for the health and safety of the community became uncontainable. I finally went to a Brown & Root general foreman and SAFETEAM with the problems I believed threatened the public's health and safety. As a result of raising my safety concerns I was demoted, harassed and finally removed from the Comanche Peak site. I refused to be silenced. I immediately contacted the citizens intervenor, CASE. CASE's attorneys agreed to represent me before the NRC Atomic Safety and Licensing Board (ASLB) and before the Department of Labor (DOL) in a wrongful discharge complaint brought under Section 210 of the Energy Reorganization Act.

On or about November 18, 1986 Brown & Root's attorneys made a $35,000 settlement offer to my former attorneys. In exchange I was not to present my safety concerns to the ASLB or testify in any administrative or judicial proceeding adverse to the interests those constructing Comanche Peak. The concerned parties were aware I had not revealed all of my safety concerns when the settlement agreement was

executed.

A secret settlement agreement which restricted my right to testify before the ASLB was signed. The events surrounding the settling of my labor case are more fully set out in the affidavits attached hereto.

Specifically the agreement:

1) Barred my voluntary testimony before the ASLB;

2) Barred my testimony in various NRC Staff proceedings;

3) Barred me from testifying in other cases pending against Texas Utilities and Brown & Root;

4) Barred my attorneys from calling me as a witness or "inducing" CASE or any other person from calling me as a witness before the ASLB or before PUC hearings; and

5) Required me to notify Brown & Root's and Texas Utilities' attorneys in the event I was ever subpoenaed to testify and further required me to take all "reasonable" steps in response as ordered by the utility's attorneys.

On September 9, 1988, I requested that the U.S. Secretary of Labor find this hush money settlement agreement null and void as a matter of public policy.

On September 12, 1988, a local Texas group filed an intervention petition with the NRC requesting that a hearing be held to determine whether the paying of money to potential witnesses before an ongoing ASLB proceeding was legal and whether such a practice threatened the health and safety of the public. As you are aware, on December 21, 1988 the NRC issued an unbelievable Memorandum and Order that essentialy upheld the legality of paying witnesses not

to testify before an ASLB. Specifically, the ruling upheld paying a person who the NRC knew had unresolved safety allegations not to:

1) Inform the legal intervenor about the concerns;

2) Testify before the ASLB or any other proceeding related to Comanche Peak;

3) "Induce" other persons, including the NRC staff, from calling the whistleblower as a witness.

On or about January 19, 1989 I challenged this atrocious precedent set by the NRC. Being unemployed, I was forced to borrow money from my 16 year old daughter to cover the costs of filing a petition to the United States Court of Appeals. Then I drove to Washington, D.C., and informed this Honorable Committee of the NRC's failure to adhere to a basic principle -- that paying money not to tell the NRC of safety concerns is illegal.

On April 20, 1989, the Commission issued a circuitous and torchured decison reversing its earlier statement that hush money settlements were acceptable. This decision attempted to paint me as having withheld safety concerns from the NRC which the Commision called "unfortunate." What is truly unfortunate is that NRC Staff knew that I still had unresolved safety concerns and chose to uphold illegal hush money agreements.

Although I had been silenced by the settlement agreement, what silenced the NRC Staff? NRC Staff knew I had additional safety concerns and even acknowledged this fact in a verifiable phone conversation in 1986. Staff's

failure to act is not "regrettable" -- it is grossly negligent.

Not until April 28, 1989 did NRC Staff finally acknowledge in a notice sent to all Licensees that settlement agreements barring workers from going to the NRC with safety concerns is unacceptable.

The NRC's flip-flop has confused the very industry it is supposed to regulate. First, the NRC stated the settlement is o.k., then it may not be, then the NRC did not have jurisdiction to decide whether it is legal. Now the NRC says that money for silence is unacceptable. What is a common worker, let alone the most sophisticated individuals in the nuclear industry, supposed to make of this? Clearly, the Commission is not the captain of its own ship.

RESPONSE

On April 14, 1989 this Subcommittee requested me to provide my views on the legality of money for silence settlements. They are illegal. The NRC appears to have finally come around to this point of view. But what took so long? The Commission is supposed to be entrusted with protecting the health and safety of the American public. For most of its course the Commission has failed to consider the safety implications involved with paying potential witnesses not to testify. This Honorable Committee should hold the NRC and their licensees accountable for their repugnant actions.

Thank you very much for providing me an opportunity to finally be heard on this vital issue.

STATEMENT OF LOUIS AUSTIN BEFORE THE
SENATE SUBCOMMITTEE ON NUCLEAR REGULATION

My name is Louis Austin. I am the Chairman and Chief Executive Officer of Brown & Root, Inc. I received a Bachelor of Science Degree in Mining Engineering from the University of Alabama in 1942. Brown & Root is an engineering and construction company located in Houston, Texas. Among other projects, we design and build nuclear power plants. We have been involved in the Brunswick Nuclear Project in North Carolina and the South Texas and Comanche Peak projects in Texas.

I have been requested to appear today in connection with the Subcommittee's concern that some settlement agreements used to resolve employment disputes may unduly restrict the flow of information to the Nuclear Regulatory Commission. Specifically, the Subcommittee has asked whether current law permits settlements in which employees agree to limit their voluntary participation in proceedings under the Atomic Energy Act.

First, I want to emphasize that I am not a lawyer. I am not able to interpret the various statutes, regulations and cases which define current law on this subject. What I will be pleased to do is explain Brown & Root's policies and procedures in this area.

It has always been Brown & Root's policy to encourage full and complete disclosure by employees of any concerns about the safety of the projects we build. This policy is nowhere more important or emphasized than at our nuclear power plant sites.

Brown & Root is committed at Comanche Peak to ensuring that every one of our employees understands his right and, in fact, responsibility to report promptly any safety concerns. We have attempted to create an atmosphere on site which encourages all employees to freely communicate and to pursue those concerns until satisfactory resolution. We do not tolerate acts of intimidation, harassment or threats against those who report safety concerns. We have developed policies, programs and procedures which are constantly implemented throughout each employee's tenure on the project with these goals in mind.

EMPLOYEE INFORMATION PACKET

As each employee begins work on Comanche Peak, he is provided with an Employee Information Packet. That Packet informs him of the Project's Open Door Policy -- that "all employees have access to any level of management" and that "if [his] supervisor does not resolve [his] concern, then it may be elevated to the next higher levels of management until resolved." Further, each new employee is informed of his responsibility to report any nonconforming conditions to his supervisor or to Quality Assurance. The employee is made aware that "if the items [of concern] are

not corrected or if [he has] any concerns about the acceptability of work performed in the plant, these concerns should be reported immediately to Project Management, Safeteam, or the NRC." Finally, a new employee is made aware that layoff, reductions of force, and termination decisions are made within a framework "to assure all Comanche Peak employees that they can and should, without reluctance, report any Safety or quality related concerns without fear of reprisal, retaliation, or intimidation."

QUALITY IMPROVEMENT TEAM

We have in place numerous programs to ensure that employees are able to communicate safety concerns to Management. One of these is the Quality Improvement Team program. As recently as April 4 of this year, all Brown & Root Comanche Peak personnel were reminded of their ability to bring any work or safety-related issues to the Quality Improvement Teams. At that time, Brown & Root Management reiterated the following commitment:

> Your work or safety-related problems will be brought to management's attention and the resolutions or status will be included on the minutes of the QIT meeting.

SAFETEAM

Safeteam is another Comanche Peak administrative program to help further the identification and investigation of any safety concerns by workers at Comanche Peak. This program provides all

site workers with an opportunity to report concerns at any time. The program is administered through an on-site office by a full time Safeteam Manager. Workers who so desire may remain anonymous. All employees are provided with phone numbers to contact the Safeteam.

HOTLINE

Comanche Peak also has in place the Hotline which is another administrative program established to encourage the reporting of quality concerns and the timely investigation and resolution of those concerns. This program is administered by the Project Director of Corporate Security. Again, those who report concerns to the Hotline Program may do so in confidence.

NRC

We make clear to all of our employees that they are free to communicate directly and confidentially with the NRC by calling or requesting a meeting with NRC inspectors (including site resident inspectors), the NRC Region IV Office in Arlington, Texas, or the NRC Director of Inspection and Enforcement. We do so through procedures issued to all employees, in periodic Project-wide meetings and memoranda, and by posting Form NRC-3 throughout the Comanche Peak site. Form NRC-3 explains the responsibility of all employees to report violations of NRC requirements and discusses how those violations can be reported. The form also

98-980 0 - 89 - 6

makes clear that employees cannot be discriminated against for reporting violations or otherwise cooperating with the NRC and explains the procedure for employees who believe they have been discriminated against to file a complaint with the Department of Labor.

TERMINATION PROCEDURES

Finally, when Comanche Peak workers are terminated, for whatever reason, we attempt to give them an opportunity and a forum for communicating safety concerns. Employees are encouraged to participate in a Confidential Safeteam exit interview at the time of termination. At that time, we ask those employees to identify any specific concerns they may have. The information elicited by the exit interview is then followed up by the Safeteam. Terminated employees who decline to be interviewed by the Safeteam are asked to sign a form so indicating.

PERSONAL COMMITMENT

Throughout my involvement with Comanche Peak, I have been personally committed to completing the project in a safety and quality conscious manner. I have repeatedly reminded our Brown & Root workers and managers that it is their duty to report and follow through on safety concerns. I have made every effort to foster an environment on Comanche Peak in which all personnel feel that they can freely report any concerns they may have

concerning quality matters without any fear that their job will be adversely affected. For example, I would like to read from a memorandum I sent on July 11, 1985 to all Brown & Root Comanche Peak workers:

1. It is your responsibility to report any safety or quality concern which you discover. The responsibility for reporting safety concerns does not rest solely with quality control personnel. It is a duty that each of you share in insuring the safe operation of Comanche Peak.

2. If you report a safety concern and do not receive a reply to that concern within a reasonable time, do not hesitate to use one of the several other avenues that are available to you. If your supervisor does not take your concern seriously, then go to his or her supervisor or manager. If for some reason you have a problem with reporting a concern, take that concern higher up the chain of command if necessary.

3. Feel free to report any of these concerns either to your supervisor, or to QC, to Safeteam, or to the NRC.

4. Anyone interfering with your obligation to take the action described above will be violating Brown & Root policy and will be subject to severe disciplinary action. In this connection, each employee is reminded of the policy letter on harassment dated December 20, 1983, directed to all site personnel at Comanche Peak. Should anyone attempt to interfere with your reporting of safety concerns, such conduct requires immediate attention and should likewise be reported.

Brown & Root is sensitive to the important public policy of insuring that there is a free and unfettered flow of safety-related information to company management and to regulatory agencies. This recognition has guided us in our work on Comanche Peak and our other projects, and will continue to be the touchstone by which we evaluate our actions and procedures.

Brown & Root has had as many as 5,000 employees at one time on the Comanche Peak project. As the project progressed through its various stages, the work force was modified as needed. There were of necessity many layoffs and terminations of personnel. The vast majority of such employees simply leave. Some, usually those who have been terminated, are unhappy. A few sue for one reason or another. Given the cost and unpredictable nature of litigation, we usually settle these claims. Most of our Settlement Agreements contain confidentiality clauses by which one or both parties agree not to disclose the terms of the Settlement Agreement. Such confidentiality clauses are commonly found in agreements to settle litigation, particularly in the area of employer/employee litigation where employers have a strong interest in not disclosing the terms of settlement to other employees. Employees also many times do not wish the details of their settlements to be made public. This is certainly true on a construction project where the nature of the work is such that large numbers of employees must be terminated as the work winds down.

I understand that in one Settlement Agreement certain language was inserted on the advice of our legal counsel. That Agreement provides that a terminated employee will appear as a witness in any administrative or judicial proceeding in which Brown & Root or other Comanche Peak companies are parties only if required to do so by valid legal process.

I am informed there is only one Brown & Root settlement agreement with this language. I have also been informed that this Settlement Agreement in no way limited the terminated employee's ability to go to the NRC staff with concerns about the project.

I am not aware of any clear or uniform policy today as to whether such a clause is appropriate, and the issue appears to be in a state of flux. For example, in December, 1988, the Nuclear Regulatory Commission, in discussing this particular Settlement Agreement, concluded:

> As long as the individual's right to bring matters to the NRC in a reasonably convenient manner is not curtailed, we do not see a violation of federal law or NRC regulation. (Dec. 21, 1988 Memorandum and Order, p. 10.)

The Commission recently reaffirmed its interpretation that the agreement did not prevent the employee from bringing any safety concerns directly to the NRC staff. (Memorandum and Order of April 20, 1989, p. 10 n.7.)

We understand that in the last few days some guidance has been issued by the NRC staff regarding such settlement agreements. We will of course comply with that guidance, and in fact have already done so with regard to our agreement with Mr. Macktal. Our policy has been, and will continue to be, that Brown & Root will take every possible step to assure that safety concerns on our projects are identified, addressed and resolved.

aplaustest.wo

**Testimony of Michael D. Spence
Presented before the Senate Environment and
Public Works Committee, Subcommittee
on Nuclear Regulation May 4, 1989**

My name is Michael D. Spence. I am President of the Generating Division of Texas Utilities Electric Company. Texas Utilities Electric Company (TU Electric) is headquartered in Dallas, Texas and is presently constructing two Westinghouse designed pressurized water nuclear power plants in Somervell County, Texas, which are known as the Comanche Peak Steam Electric Station (Comanche Peak).

As we understand it, the Subcommittee is conducting an inquiry concerning whether and to what extent agreements to settle litigation brought by Comanche Peak workers improperly impeded the presentation of information regarding nuclear health and safety concerns to the NRC.

I would like to assure this Subcommittee that TU Electric has not entered into agreements which impede the flow of information to the NRC and that any such action would be contrary to TU Electric's established policies and practices. The most important agreement that we reached in the licensing of Comanche Peak increases the flow of information to the NRC.

I. Background

Construction on Comanche Peak began in October 1974 after the Atomic Energy Commission issued a Limited Work Authorization. In March 1979, an Atomic Safety and Licensing

Board (ASLB) was established to determine whether hearings should be held on TU Electric's operating license application for Comanche Peak. Three parties, Citizens Association for Sound Energy (CASE), Citizens for Fair Utility Regulation (CFUR) and the Texas Association of Community Organizations for Reform Now/West Texas Legal Services (ACORN), were granted intervenor status. The State of Texas was also admitted as an interested state. ACORN and CFUR withdrew from the operating license (OL) proceedings and as of April 1982, CASE was the only party remaining before the ASLB in the OL proceeding.

In December 1983 the ASLB issued a decision that called into question the design controls for piping and pipe supports at Comanche Peak. Extensive hearings ensued and a series of NRC inspections led TU Electric to request a suspension of hearings on January 30, 1985 and to initiate a quality validation program of a breadth and depth that is unprecedented in the nuclear industry.

The NRC staff activities that led to the quality validation program included a series of inspections by the Technical Review Team (TRT). The TRT's review began in July of 1984 and was initiated by the NRC staff to assure that all remaining licensing issues were resolved prior to the consideration and issuance of an operating license. The majority of the results of these inspections were published in the NRC's Supplemental Safety Evaluation Reports (SSERs) 7, 8, 9, 10 and 11. The NRC has continued to provide increased attention to Comanche

Peak through the Office of Special Projects which was established in 1987 in order to provide increased inspections and oversight of Comanche Peak and the plants owned by the Tennessee Valley Authority.

The quality validation program undertaken by TU Electric is far ranging and unprecedented in the nuclear industry. This program included:

(1) An Independent Assessment Program (IAP) by CYGNA Energy Services (CYGNA) of the design at Comanche Peak.

(2) A design and hardware validation program for piping and pipe supports performed by the Stone & Webster Engineering Corporation (SWEC).

(3) The Comanche Peak Response Team (CPRT) which was established to evaluate any issues identified by the TRT and other external sources (including issues identified during the hearings and by the ASLB).

(4) Based on the preliminary results of the CPRT, TU Electric established the Corrective Action Program (CAP) which includes a design validation program and a post construction hardware validation program. The CAP is subject to overviews by the CPRT, the Technical Audit Program (TAP) and the Engineering Functional Evaluation (EFE). The CAP was approved by the NRC staff. The results of the design validation phase were issued in "Project Status Reports" which were reviewed and approved by the NRC staff in SSERs.

TU Electric responded to CASE's (the intervenor) numerous informal discovery requests concerning TU Electric's quality validation programs. Additionally, TU Electric held a series of public meetings with CASE to describe the Corrective Action Program and TU Electric's methodology for resolution of

issues of concern to CASE. These meetings provided CASE and its technical consultants with the opportunity to resolve many of their concerns regarding the design of Comanche Peak. Furthermore, the representatives of CASE have been allowed to tour the plant and to observe the implementation of quality validation programs at Comanche Peak.

By the fall of 1987, TU Electric's validation program had yielded substantial results. In light of that progress, on November 18, 1987, the ASLB set a schedule for the completion of all hearings for the operating license of Comanche Peak. The ASLB's schedule required CASE to delineate in the spring of 1988 the specific issues regarding TU Electric's quality validation program that it intended to contest in the licensing proceeding.

After discussions between TU Electric and CASE and extensive exchanges of technical information described above, it became apparent that CASE had no fundamental issue with the structure and methodology of TU Electric's programs. Rather, CASE was interested primarily in questions concerning whether the program would be implemented as described. In other words, CASE ultimately wished to monitor implementation of the program. This realization led to discussions about the possibility of settling the litigation and the creation of an alternative mechanism under which CASE could better satisfy its objective of effectively monitoring the implementation of TU Electric's validation program.

II. The Agreement Between CASE And TU Electric To Settle The Comanche Peak Operating License Proceeding Does Not Prohibit CASE From Contacting The NRC

After approximately nine years of litigation, CASE and TU Electric reached an agreement on June 28, 1988 to seek a dismissal of all proceedings before the ASLB relating to Comanche Peak. The agreements between CASE and TU Electric concerning the settlement of the Comanche Peak proceeding are contained in the "Joint Stipulation" and the "Settlement Agreement." 1/ The NRC Staff was also a party to the Joint Stipulation. The Settlement Agreement and Joint Stipulation were presented to the ASLB on July 13, 1988, before the ASLB dismissed the proceedings, and were made a part of the public record. The Joint Stipulation was the basis for the ASLB's July 13, 1988 Order dismissing the proceedings. The ASLB strongly supported these agreements. 2/

The settlement provided CASE the following mechanisms for continued direct oversight into Comanche Peak activities:

1/ Texas Utilities Elec. Co., et al., (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-88-18B, 28 NRC 103, 107-135 (1988) (Exhibits A and B).

2/ The Chairman of the ASLB (Bloch, J.) stated, in the July 13, 1988 Prehearing Conference, "I would like to see this kind of cooperation so that there could be increased assurance for the safety of plants. I think it is a model. I[t]'s a possible way that in future times the country might choose to go if other forces permit further nuclear power to be begun." Tr. 25,288.

A representative of CASE was appointed to the Comanche Peak Operations Review Committee 3/ for a period of five years and given access to the site and relevant documents necessary to carry out this responsibility.

CASE was given the right to monitor the audits conducted by TU Electric's QA department and given access to the documentation associated with these audits.

CASE would receive copies of all correspondence between the NRC staff and TU Electric and would be given notice and the opportunity to attend noticed meetings between TU Electric and the NRC staff and exit meetings after NRC inspections.

TU Electric committed to reimburse CASE for the costs of retaining technical consultants for a period of five years in an amount not to exceed $150,000 per year.

Under the settlement, CASE expressly reserved the right to take any safety concern to the NRC staff. The Joint Stipulation states that "[n]othing in this Stipulation shall

---

3/ The Comanche Peak Operations Review Committee (ORC) is required by the Technical Specifications and is assigned the responsibility for review of various safety related matters including nuclear power plant operations, nuclear engineering, radiological safety and quality assurance practices. The ORC is also responsible for independent review of proposed modifications to the Comanche Peak facilities or procedures, changes to the Technical Specifications or a license amendments, any violations or deviations which are required to be reported to the NRC and other safety related matters deemed appropriate by the ORC. The ORC meets periodically and reports its findings and recommendations directly to the Executive Vice President, Nuclear Engineering and Operations. Letter W. G. Counsil (TU Electric) to J. Ellis (CASE) (June 28, 1988) (LBP-88-18B, 28 NRC at 136 (Exhibit C)).

prohibit CASE from continuing to exercise its existing rights to communicate with the NRC or any of its offices." 4/

Under the Joint Stipulation, the NRC staff agreed to resolve disputes between CASE and TU Electric concerning the design, construction, or operation of Comanche Peak. CASE obtained the right to appeal any such NRC staff decision on its concerns to the Director of the Office of Nuclear Reactor Regulation. Moreover, the Joint Stipulation stated that "[t]he provisions in th[e] Joint Stipulation do not prohibit CASE from contesting amendments to full power CPSES operating licenses or from seeking relief under the provisions of 10 C.F.R. 2.206 in the event that it is not satisfied with the resolution of any disputes...." 5/

In recognition of CASE's concerns about former Comanche Peak workers who had pending employment discrimination claims against TU Electric or its contractors, TU Electric agreed to enter into good faith settlement negotiations to resolve such disputes. 6/ TU Electric agreed to settle these claims for an amount not to exceed $5.0 million. 7/ Of that amount, a total of

---

4/ Joint Stipulation at 14.

5/ Id. at 13-14.

6/ Settlement Agreement at 3.

7/ See Tr. 25,268-269.

$4.8 million has been paid to former workers to settle such claims.

TU Electric agreed to reimburse CASE $4.5 million for the expenses it incurred during the nine years of administrative hearings and related federal court litigation. 8/ TU Electric also committed to CASE to provide amounts, not to exceed $500,000, for payment to workers who did not have pending litigation or claims. These payments would be made at the sole direction of CASE to workers who, in CASE's opinion, contributed to CASE's efforts.

III. CASE-TU Electric Settlement Is Supported By The Commission's Long Standing Policies And Is In The Public Interest

The Commission has a longstanding policy in support of settlements of contested licensing proceedings like that between CASE and TU Electric. The Commission's rules encourage "the fair and reasonable settlement of contested initial licensing proceedings" and "expect[] that the presiding officer and all of the parties . . . will take appropriate steps to carry out this purpose." 10 C.F.R. § 2.759 (1988). In promulgating this policy:

> The Commission [was] concerned not only with its obligation to the segment of the public participating in the licensing proceedings but also with its responsibility to the general public -- a responsibility to arrive at sound decisions, whether favorable or unfavorable to any particular party, in a timely fashion.

8/ Settlement Agreement at 5.

> The Commission expressly recognize[d] the positive necessity for expediting the decision making process and avoiding undue delays. 9/

The benefits to CASE under the settlement are obvious. CASE has obtained access to Comanche Peak and the resources to investigate any concerns that it might identify. The settlement creates a process for the resolution of CASE's concerns that is predicated on the NRC's involvement. The effect of the settlement is to turn an intervenor with limited rights in a licensing proceeding into a well-funded monitor of activities at Comanche Peak with direct access to the NRC. The settlement does not, in any way, impede the flow of information to the NRC. On the contrary, it greatly increases the flow of information to the NRC.

The public clearly benefits from the additional review mechanism created by the settlement and performed under the direction of CASE. The settlement eliminates the uncertainty and expense of protracted licensing proceedings and allows greater resources to be devoted to safety review of the plant itself. The public receives a direct benefit through the timely licensing of Comanche Peak and the elimination of further delay in a proceeding which was already nine years old.

9/ 37 Fed. Reg. 15,127 (July 28, 1972).

IV. The TU Electric Agreements With Former Workers Do Not Impede The Flow Of Information To The NRC

TU Electric has not been involved in any agreements that have been intended to, or in our view, have had the effect of impeding the flow of information to the NRC.

Out of CASE's concerns about former Comanche Peak workers, TU Electric agreed to negotiate in good faith to settle pending litigation by former workers. The CASE-TU Electric settlement agreement contemplated that TU Electric would obtain a general release from the workers with employment discrimination claims. These releases were intended to settle pending lawsuits and do not preclude anyone "from bringing any safety or technical matter to the attention of the NRC." 10/ As stated by Counsel for CASE before the ASLB:

> No worker is prohibited from raising his concerns in any form he seeks. The only thing the workers are being asked to release is their liability claims against the company for their allegation that they were wrongfully discharged. 11/

The ASLB also agreed that "[t]here is no restriction at all on anyone coming to the NRC with safety concerns." 12/

10/ Tr. 25,268 (Edgar, Counsel for TU Electric).

11/ Tr. 25,257 (Roisman, Counsel for CASE).

12/ Tr. 25,268 (Bloch, J., Chairman of the Licensing Board).

None of the releases in agreements associated with those settlements in any way limit the ability of the workers to present nuclear safety concerns to the NRC. In fact, the agreements settling those worker claims under Section 210 of the Energy Reorganization Act expressly state that the workers are expected to disclose their safety concerns to TU Electric and participate in their resolution, and that nothing in the agreement shall sacrifice the worker's rights to contact the NRC Staff with his/her concerns.

V. Mr. Macktal's Settlement With Brown & Root Did Not Prevent Him From Taking Safety Concerns To The NRC

TU Electric understands that the Subcommittee has specific concerns about the settlement agreement between Joseph J. Macktal, Jr. and our contractor, Brown and Root, Inc (Brown & Root). The legality of that agreement is now pending before the Department of Labor.

In February 1986, Mr. Macktal filed a complaint against Brown & Root under section 210 of the Energy Reorganization Act of 1974 (42. U.S.C. § 5851 (1982)) before the Department of Labor. Mr. Macktal was an electrical journeyman who had been counseled for excessive absenteeism. His employer, Brown & Root, is a construction contractor at Comanche Peak. In Mr. Macktal's complaint, he alleged that he had reported safety concerns to TU Electric's SAFETEAM, was going to seek an NRC investigation of his

concerns, and in retaliation had been subject to adverse actions by his employer, Brown & Root. 13/

On January 2, 1987, after substantial prehearing discovery, Mr. Macktal and Brown & Root agreed to a settlement which provided that 1) neither party made a concession regarding the merits of the complaint, 14/ 2) Brown & Root would pay $35,000 to Mr. Macktal and his attorneys, 15/ 3) Mr. Macktal would move for dismissal of his complaint with prejudice, 16/ and 4) Mr. Macktal agreed that he would not voluntarily appear as a witness or a party "in any administrative or judicial proceeding" opposing Brown & Root or any other Comanche Peak company. 17/ Although TU Electric was not a party to Mr. Macktal's proceeding before the Department of Labor at the time of the CASE Settlement, we are aware that he is attempting to reopen this proceeding and nullify his agreement with Brown & Root.

13/ Texas Utilities Company, the parent of TU Electric, was originally named as a respondent in the complaint. However, Texas Utilities Company was subsequently dismissed from the proceeding because none of the Texas Utilities Companies was properly made a party to the proceeding or at "any time manifested the attributes of an employer with respect to the complainant ...." Macktal v. Brown & Root, Inc., No. 86-ERA-23, slip op. (Aug. 7, 1986).

14/ Settlement Agreement (Macktal v. Brown & Root, No. 86-ERA-23), at 2 (Jan. 2, 1987).

15/ Id. at 4.

16/ Id.

17/ Id. at 1-3.

Mr. Macktal has characterized the last provision described above as a bar against him raising concerns to the NRC. The provision does no such thing. The provision does not affect his ability to communicate any concerns to the NRC staff or to the public in general. Nor is there any limitation on the ability of the NRC (or other organizations, such as CASE or CFUR) to obtain information from him. The Commission's reading of Mr. Macktal's settlement would "allow the individual involved to bring any safety concerns he has directly to the NRC, ... and to respond to an administrative subpoena...." 18/ Although the Commission has withdrawn any comment on the legality of Mr. Macktal's settlement, it has affirmed its interpretation of Mr. Macktal's settlement. 19/

Mr. Macktal has not been prevented from raising safety allegations. When Mr. Macktal was employed at Comanche Peak, he brought several concerns to SAFETEAM. SAFETEAM is an onsite organization that performs confidential investigations of worker's concerns about safety for TU Electric. SAFETEAM evaluated Mr.

18/ Texas Utilities Elec. Co., et. al., (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 12 NRC 605, 612 (1988), modified, CLI-89-06, slip op. (Apr. 20, 1989).

19/ Memorandum and Order CLI-89-06, slip op. at 10 n.7 (Apr. 20, 1989). While we agree with the Commission's decisions relating to the Macktal settlements we also have no quarrel with, and will certainly abide by, the recent Commission directive requiring that licensees identify and render unenforceable restrictive language in settlement agreements.

Macktal's concerns and provided him with the results of its investigation.

Mr. Macktal also provided a number of allegations to the NRC in 1986. The NRC staff published the results of its investigation of Mr. Macktal's concerns in a December 1986 inspection report. 20/ A few of his allegations were substantiated by the NRC staff. 21/ By mid-1987, TU Electric had notified the NRC of the actions taken to resolve the staff's concerns about these matters. 22/

Although Mr. Macktal now claims that he deliberately withheld information from the NRC staff during discussions in 1986, the NRC addressed the allegations that Mr. Macktal provided "in the regular inspection reports at the Comanche Peak facility." 23/ In its recent ruling, the Commission emphasized that such withholding of information is regrettable, requested that Mr. Macktal bring such concerns to the NRC staff and noted that the staff would review any such technical concerns in accordance with "normal staff practice." 24/ If any such

---

20/ NRC Inspection Report 50-445/86-15, 50-446/86-12, Appendix C.3.b, at 6-18 (Dec. 22, 1986).

21/ Id.

22/ Letters From W. G. Counsil (TU Electric) to NRC dated February 2, 1987 (TXX-6250) and May 22, 1987 (TXX-6466).

23/ CLI-89-06, slip op. at 10; see also NRC Inspection Report 50-445/87-13, 50-446/87-10 (Oct. 7, 1987).

24/ CLI-86-09, slip op. at 10.

withholding of information took place, it certainly could not have been caused by the agreement with Brown & Root, which was not executed until 1987. In any event, in light of the NRC's April 27, 1989 directive, Brown & Root has since advised Mr. Macktal that it will not enforce any restriction on the presentation of safety information to the NRC.

The agreement did not prevent Mr. Macktal from contacting the organization within the NRC with ultimate safety responsibility. Let me explain my understanding of how organizational responsibility is assigned within the NRC. The NRC staff has the primary role for resolving safety allegations such as those raised by Mr. Macktal. The Director of Nuclear Reactor Regulation (NRR), who is the NRC Staff's senior regulatory official, has been delegated the authority to make the findings under 10 C.F.R. § 50.57 that there is "reasonable assurance" that the facility can be operated "without endangering the health and safety of the public..." and "in compliance with the [Commission's] regulations...." 25/ The Director of NRR issues the operating license for a facility and has the responsibility to resolve all issues associated with the license.

The Atomic Safety and Licensing Board's (ASLB's) role in the issuance of an operating license for a nuclear reactor is generally limited to determining issues placed in controversy by

---

25/ 10 C.F.R. § 50.57(a)(3) (1988).

the parties in hearings before the ASLB. 26/ The ASLB does not issue a license. It resolves those contested issues presented by "parties" to a trial-type proceeding, and these issues are generally but a small subset of the issues that the NRC staff must resolve for license issuance. Moreover, only a party such as CASE has a right to participate before the ASLB. A potential witness who is not a party, such as Mr. Macktal, has no legal right to participate before the ASLB. Since all of Mr. Macktal's concerns that he was willing to disclose to the NRC have been addressed by the NRC staff, there is simply no basis to conclude that there was any impediment to the flow of safety information to the responsible organizational element of the NRC.

VI. Mr. Macktal's Settlement Agreement With Brown & Root Is Not Related To The CASE-TU Electric Settlement

The settlement between Mr. Macktal and Brown & Root bears absolutely no relationship to the Joint Stipulation and the Settlement Agreement which were before the ASLB when the Comanche Peak proceedings were dismissed. The Macktal settlement was entered into eighteen months before the July 13, 1988 prehearing conference. It resolved matters then pending before the Department of Labor, not before the NRC. The Macktal-Brown & Root settlement was not dependent upon the settlement of the Comanche

---

26/ 10 C.F.R. § 2.760a (1988).

Peak licensing proceeding and did not affect the settlement of that proceeding.

VII. The Settlement With Gibbs & Hill Did Not Keep Allegations From The NRC

TU Electric is also aware of one other agreement entered into by Gibbs & Hill that contains language similar in some respects to the Macktal-Brown & Root agreement. However, the Gibbs & Hill agreement contains an explicit provision that nothing in the agreement shall preclude the worker from taking concerns to the NRC. I should point out that this settlement has not been consummated and is currently under review by DOL. Furthermore, I understand that Gibbs & Hill, consistent with the NRC's recent directive, has advised the Plaintiff's legal counsel in that case that it will not seek to enforce any restriction on presentation of safety information to the NRC.

This worker brought a series of concerns about high energy fluid system piping to TU Electric. 27/ TU Electric addressed these concerns and provided reports for review by the NRC staff of the actions taken to resolve them. 28/ The NRC also

---

27/ TDDRs #DS-86-2302 to 2304 (Oct. 23, 1986).

28/ Letter from W. G. Counsil (TU Electric) to NRC (Jan. 18, 1988) (TXX-8818; High Energy Line Break Analysis SDAR: CP-87-133 (Final Report)); Letter from W. G. Counsil (TU Electric) to NRC (Jan. 18, 1988) (TXX-8819; Pipe Whip Restraint Design Methodology SDAR: CP 87-53 (Final Report)).

reviewed the worker's allegations of employment discrimination that were pending before the Department of Labor and asked TU Electric to provide a response addressing the adequacy of its practices and policies concerning employees and contractor employees who raise safety concerns. 29/ TU Electric responded and demonstrated to the NRC staff that there are multiple layers of protection for workers at Comanche Peak and management policies that seek to discover the workers concerns about safety. 30/ Accordingly, both TU Electric and the NRC have addressed all of the concerns that this worker has presented. There is simply no evidence to suggest that the Gibbs & Hill settlement impeded the flow of information to the NRC.

VIII. Answer to Subcommittee Questions

In a letter dated April 14, 1989 to Micheal D. Spence, the Subcommittee posed the following questions:

1. Does the current law permit an NRC licensee, applicant for a license, contractor, or subcontractor of an NRC licensee to enter into contracts or agreements with its employees, former employees, or former employees with pending claims against the employer under section 210 of the Energy Reorganization Act of 1974, whereby in exchange for financial consideration such employees or former employees agree to restrictions upon

---

29/ Letter from NRC to TU Electric (Apr. 11, 1988).

30/ Letter from W. G. Counsil (TU Electric) to NRC (June 10, 1988) (TXX-88491).

their ability to testify or participate in proceedings under the Atomic Energy Act?

2. If you believe such agreements are permissible under current law, is this good public policy? Should the law be amended to prohibit this?

I am advised by counsel that current law does not prohibit restrictions on voluntary testimony before an ASLB, provided that the employee is nonetheless free to bring nuclear safety information to the NRC. In our view, it is good public policy to encourage settlement of costly and time consuming litigation so long as such settlements do not restrict the flow of health and safety information. No changes in existing law are necessary. NRC has legal authority to issue the recent directive and that directive is sufficient to foreclose any restrictions that might conflict with good public policy.

IX. Conclusion

- The CASE-TU Electric settlement is supported by long standing NRC policy, increases the flow of information to the NRC, and is clearly in the public interest.
- The settlement agreements with former Comanche Peak workers that resulted from the CASE-TU Electric agreement do not contain language that in any way limits their ability to present safety issues to the NRC.
- Mr. Macktal's settlement with Brown & Root is not in any way related to the CASE-TU Electric settlement.

- Mr. Macktal's settlement did not prevent him from contacting the NRC. In fact, all of his concerns that he was willing to disclose have been addressed by TU Electric and the NRC.

- The Gibbs & Hill settlement would not limit the flow of information to the NRC.

Testimony of CASE President Juanita Ellis
for May 4, 1989, Hearing
Before Subcommittee on Nuclear Regulation
of the Environment and Public Works Committee
of the United States Senate

Senator Breaux and members of the Subcommittee, thank you for affording me this opportunity to file this written testimony for your hearing. As I explained to Mr. Berkovitz by telephone, my health prevents my being able to attend the hearing in person /1/.

I want to make clear at the outset that I mean no disrespect to the Subcommittee in anything I say in this testimony. However, I believe that this Subcommittee has been seriously and extensively misled. And I must state that I am deeply disturbed, distressed, and concerned regarding the manner in which these proceedings have been handled. Many of the statements which have appeared in the local press, including some statements attributed (whether correctly or incorrectly) to Senator Breaux, chairman of the subcommittee /2/, unfortunately and erroneously continue the public harassment and defamation of CASE which began when CASE made a settlement with Texas Utilities Electric Company regarding the operating license proceedings for the Comanche Peak nuclear power plant before the U.S. Nuclear Regulatory Commission's Atomic Safety and Licensing Board in July 1988. It is very disturbing to CASE that this subcommittee's hearing was

/1/ It is my understanding that the subcommittee will send me a letter confirming that any statements regarding my health submitted by me or my doctor will be treated in strict confidence, following which I will send the subcommittee an affidavit attaching a letter from my doctor.

/2/ See: 4/18/89 Subcommittee press release; 4/19/89 DALLAS TIMES HERALD; 4/19/89 DALLAS MORNING NEWS; and of special concern are the statements attributed to Senator Breaux in the 4/19/89 FORT WORTH STAR-TELEGRAM.

scheduled and subpoenas were issued prior to even an attempt to determine the truth. It is my sincere belief that had even a minimal amount of investigation been undertaken, many of the questions which have been raised could have been quickly and simply resolved, without CASE's being unfairly maligned once again. Since CASE was founded in January 1974, 15 years ago, we have worked very hard and long to establish our credibility and to document our concerns and the concerns of numerous workers and whistleblowers.

However, CASE always has been, and is, dedicated to the truth — and, as distressing as it is that this subcommittee has seen fit (we assume because it has received erroneous information and not because of any improper motivations) to add its voice to detractors of CASE, perhaps this hearing can still be used to bring out the truth, and CASE thanks the subcommittee for providing us with the opportunity to help do so.

We believe that as the truth emerges it will become obvious that CASE has not "sold out" and that we continue to attempt to assure that Comanche Peak will be as safe as possible and in fact are now able to monitor the plant in a much more thorough and effective manner than would have ever been possible in the confines and constraints of the licensing proceedings.

The Macktal/Brown & Root DOL Settlement Agreement; and S.M.A. Hasan:

It is my understanding that one of the issues to be addressed in these proceedings is whether or not there was anything improper in the Department of Labor (DOL) settlement agreement between Joseph Macktal and Brown & Root

and whether or not he was paid to silence him from bringing forward to the Nuclear Regulatory Commission safety concerns about the Comanche Peak nuclear power plant. In addition, although Mr. S.M.A. Hasan was not mentioned specifically by name, the subcommittee has requested documents relating to the one claim within the $5.5 million total [which flowed indirectly to workers from the CASE/TU settlement] that was not settled, which is, as everyone knows, the claim of Mr. Hasan (also known as "John Doe" in filings made by his attorneys in the Licensing proceedings).

First of all, neither I nor, to the best of my knowledge, anyone with CASE had ever seen or was aware of the wording or content of the Macktal/ Brown & Root settlement agreement until long after it was executed. (To the best of my recollection, I did not know of its wording or content except for some comments in newspapers until it was filed in the pleadings regarding attempts by Mr. Macktal and/or Citizens for Fair Utility Regulation (CFUR) to intervene in the operating license proceedings for Comanche Peak.) We found the language in the Macktal settlement agreement to be shocking. We did not like it when we first saw it, and we do not like it now.

It is our opinion that changes should be made immediately and urgently to the wording of the regulations of the Department of Labor (DOL) and/or the Nuclear Regulatory Commission (NRC) which makes it illegal for any such language or possible intent to be included in any future DOL settlement agreements.

Specifically with regard to the language on page 3 of the Macktal/Brown & Root settlement agreement, although that language is very disturbing and very distasteful to me, I must say that I do not know the reasons that Ms.

Garde or Mr. Roisman agreed to that language, but I have sufficient confidence in them to believe it is necessary to hear their side of the story before rushing to any judgment. They have a long history of working very hard to protect the interests of workers/whistleblowers while at the same time getting out the facts about nuclear power plants, and I am certainly not willing to condemn their actions without even having heard all the facts -- and neither should this subcommittee. It is my understanding from talking with Ms. Garde that Mr. Macktal's attorneys, Messrs. Kohn and Kohn, have refused her request that Mr. Macktal release her from the restrictions under which she and Mr. Roisman are placed by the attorney/client privilege. I do not know what authority or capabilities the subcommittee has in this regard, but I believe it would be a travesty of justice and unnecessarily (and, I believe, unfairly) call into question the motivations of this subcommittee if Mr. Macktal and/or his current attorneys were allowed to continue to publicly malign and attack Ms. Garde and Mr. Roisman without their being able to provide (without having to worry about being sued by Mr. Macktal) the subcommittee and the public with all the facts as they know them.

It is my understanding that Mr. Roisman initially was not subpoenaed by the subcommittee to appear as a witness, but that he has now been invited to file testimony (although he is presently out of the country), but that Ms. Garde has been subpoenaed (a situation which I do not understand at all, especially since it must be obvious that Mr. Roisman was the senior attorney of the two and that Ms. Garde would have deferred to his judgment); it is also my understanding that the attorney for Brown & Root has not been asked

to testify. We cannot believe that it is the intent of this subcommittee to turn this hearing into a "railroad" proceeding, but must point out that this is certainly the perception which will be achieved if the subcommittee does not take immediate steps to arrive at the truth. It would be unfortunate indeed if this hearing, which is concerned with the possible muzzling of workers, were allowed to be used for the public verbal flogging of two attorneys who have been muzzled by their attackers.

It should be noted that -- unlike the attorneys for Messrs. Macktal and Hasan -- CASE has waived the attorney/client privilege for Ms. Garde insofar as she has any personal knowledge of pertinent facts regarding the $5.5 million whistleblower settlement which indirectly resulted from the CASE/TU settlement. (Although Ms. Garde was not privy to details of CASE's decisionmaking regarding the CASE/TU settlement except to the extent that CASE requested and she provided her assessment and recommendations regarding the licensing proceedings, CASE also waives its attorney/client privilege for Ms. Garde regarding such assessment/recommendations.)

Again, we strongly urge that the subcommittee use whatever means are at its disposal to assure that it does not allow Mr. Macktal or his attorneys to muzzle Ms. Garde or Mr. Roisman so that the subcommittee sees only part of the picture -- that part which may lead the subcommittee to make wrong conclusions and decisions about very important issues.

Another aspect which I have been asked to address is the significance of settlements of the type of the Macktal DOL settlement. The implications of the wording on page 3 of this particlar settlement are very serious and

grave indeed, if everything were as it has been represented to be by Mr. Macktal (but remembering that it is without the benefit of any clarification by either Ms. Garde or Mr. Roisman). I am not an attorney and we are not addressing here any legal interpretation. I address it here only from the perspective of the president of an intervenor in an NRC licensing proceeding. Even if there is an adequate explanation by Ms. Garde and/or Mr. Roisman of their reasons for signing an agreement with such wording, CASE believes that it is important in DOL settlements that even the appearance of impropriety or "hush money" or money for silence about safety concerns be avoided. And, as previously stated, we believe that the regulations of the Department of Labor and/or the Nuclear Regulatory Commission should be changed immediately to avoid the possibility of even any appearance of impropriety.

One of the things that I have also been asked to discuss by the subcommittee is CASE's involvement in the Macktal DOL settlement. CASE had no involvement whatsoever in that settlement. As stated earlier, neither I nor, to the best of my knowledge, anyone with CASE had ever seen or was aware of the wording or content of the Macktal/Brown & Root DOL settlement agreement until long after it was executed. Not only was I not aware of that settlement agreement at the time, I was not asked to sign that agreement (and would not have had I been asked), and neither Mr. Roisman nor Ms. Garde was authorized to sign nor did they sign on behalf of CASE.

As to any possible significance of the Macktal DOL settlement agreement with regard to the licensing proceedings, the decision had never been finally made as to whether or not either Mr. Macktal or Mr. Hasan would be

called as witnesses in any future licensing proceedings. The Macktal DOL settlement, according to documents filed by his attorneys, took place on January 2, 1987. This was about a year and a half before CASE settled with TU; the CASE/TU settlement became final on July 13, 1988. At the time of the Macktal DOL settlement, the licensing hearings had been on hold for almost two years, and at that time it was unknown when hearings might be resumed; no additional hearings had been held by the time of the 7/13/88 CASE/TU settlement. By no stretch of the imagination could the Macktal DOL settlement and the CASE/TU settlement be construed to be related in any way or to have affected one another in any way. Nor did the Macktal DOL settlement influence in any way CASE's decision to settle with TU; nor did it affect CASE's involvement in the licensing proceedings in any way.

It is also important for this subcommittee to know that (as we always tried to do) CASE made every effort to assure that the concerns of both Mr. Macktal and Mr. Hasan were presented to the NRC as quickly as they could be organized in a coherent manner. Around January 1986, I made certain that a draft of Mr. Macktal's concerns was typed and sent to Ms. Garde. Ms. Garde was concerned at that time both with protecting the rights of GAP's client, Mr. Macktal, while at the same time assuring that the NRC was provided with his concerns as quickly as possible. Although I was also concerned with protecting Mr. Macktal's rights, I was primarily concerned at that time that there be no undue delay in getting his concerns to the NRC as quickly as possible. I therefore agreed not to use any of the information obtained so far from either Mr. Macktal or Mr. Hasan prior to further discussion with

98-980 0 - 89 - 7

Ms. Garde. I did not agree that I would not use all or any part of such information obtained following such further discussion with Ms. Garde, and I retained the option of using such information at any time after so advising her. At that time it had not been finally decided whether or not Mr. Macktal or Mr. Hasan would actually be called to testify as CASE witnesses, or how their concerns would be presented in the licensing proceedings, although it was anticipated at that time that probably both of them would be called as witnesses in some capacity at some future time after the hearings had resumed. Obviously we would have had to factor into any decision about their testifying any additional new information (such as possible damage to, or questions about, their credibility which might be brought out in DOL proceedings). It is important to understand that sometime before that point in time I had decided that any new witnesses would not be called to testify for CASE without having an attorney to help protect them on the witness stand; this decision was made following a very unfortunate and agonizing Licensing Board decision regarding two of CASE's witnesses in 1984.

There was some delay around February 1986 in getting Mr. Macktal's concerns to the NRC due to GAP's and Ms. Garde's distrust of NRC Region IV. Arrangements were finally made for Mr. Macktal to meet with the NRC in Washington, D.C., in March 1986. To facilitate this and to assure that Mr. Macktal was able to present his concerns to people with the NRC in whom Ms. Garde and GAP had more confidence, CASE paid for the cost of Mr. Macktal's airfare to Washington. In addition, to the best of my recollection, on at least one occasion, in June 1986, a CASE representative accompanied Mr.

Macktal on a plant tour to show the NRC some of his concerns (I believe Ms. Garde arranged for the tour).

Similarly, to assure that Mr. Hasan's concerns were given to the NRC, I made certain that a draft of Mr. Hasan's concerns was typed and sent to Ms. Garde; in addition, I went with Mr. Hasan to two meetings with the NRC's Technical Review Team on January 10, 1986, and January 30, 1986. Both Mr. Macktal and Mr. Hasan had every opportunity to provide all their concerns to the NRC Staff.

I feel certain that others will address what responses have been made by TU Electric and/or the NRC staff regarding the concerns of Mr. Macktal, and I will not specifically address them in detail here. However, I have identified one specific NRC inspection report (and I believe there may be at least one other one) which does address some of the specific concerns which I recognize as being those of Mr. Macktal. In TU Electric's October 20, 1988, letter to the NRC regarding Revised Response to Inspection Report Nos. 50-445/86-15 and 50-446/86-12 Notice of Violation (NOV) Item C (446/8612-B-03), TU agreed with the alleged violation and addressed it and the corrective action which they were taking. (This document is in the public record.)

After receiving authorization from both Mr. Hasan and his attorney, CASE sent the Licensing Board the NRC Staff's summary of Mr. Hasan's concerns (see 5/17/88 letter from CASE to Licensing Board, attaching NRC Staff's 1/6/88 letter to S.M.A. Hasan with enclosures, also in the public record).

I had always felt very close to Mr. Hasan and had considered him a friend. I wanted to be certain that he understood what had transpired about the settlement, and attempted to tell him about it. On July 1, 1988, the CASE/TU settlement agreement was announced publicly. On July 5, 1988, the Licensing Board issued a Memorandum and Order (Terminating Proceedings Subject to Condition), in which it terminated the operating license proceedings subject to receipt into the record of certain documents. On July 7, 1988, I telephoned Mr. Hasan to tell him about the settlement agreement; I wanted to be certain that he understood the agreement, that he fully understood that he would be receiving a sum of money in settlement of his DOL claim, that there were no strings attached to his receiving that sum of money except that he would be asked to sign a general release and that he was definitely not being muzzled from pursuing his concerns, and that he would not have to be out any additional attorneys fees or costs for his DOL case other than any which might have already been incurred. It was especially important to me to be able to explain this to Mr. Hasan myself; he is not of American descent and sometimes has difficulty understanding and making himself understood and I wanted to be very sure that he was accurately and completely apprised of the facts. Mr. Hasan spoke to me on the phone only long enough to tell me that he could not talk to me and that I would have to talk to his attorneys, the Kohns; he would not allow me to explain any further and merely said that I should please talk to Mike Kohn. At that time, it was my understanding that GAP was still his attorney, and he did not state otherwise to me. See Attachment 1 hereto, which was a note on a 3" x 5" card made by me on 7/7/88; parts of it are a little difficult

to read, but it says, in pertinent part: "7/7/88, je called Hasan; he said please talk to Mike Kohn -- but not that GAP was not atty. [attorney]." To the best of my recollection, Mr. Roisman had talked with Messrs. Kohn and made arrangements for them to have Mr. Hasan available for a meeting (with them present) around the time of the July 13, 1988, final prehearing conference; but they never showed up and I have not spoken with Mr. Hasan since my July 7, 1988, attempt.

I am still very much concerned as to what Mr. Hasan's current understanding of the CASE settlement and his DOL proposed settlement is; I strongly urge and request that, after it has a thorough understanding of the matters under consideration, this subcommittee talk to Mr. Hasan directly (with his attorneys present if desired) to find out what he has been told and whether or not he knows and understands the actual terms and conditions of both the CASE/TU settlement and his proposed DOL settlement. Although my inability to communicate with Mr. Hasan has hurt me very deeply, I am even more concerned about possible damage to Mr. Hasan and his family because I believe there is the possibility that he has been given erroneous information.

In order for the subcommittee to have a thorough understanding and to be able to make informed decisions, I believe that it is important for the subcommittee to understand at least a little bit of the extensive history of CASE's 9-year intervention in the licensing proceedings. For much of that time, CASE was not represented by an attorney. Although CASE's primary concern has been with the safety of the Comanche Peak nuclear plant and with informing the public about the manner in which the plant has been designed

and constructed, we have also been very concerned about protecting the rights and, if requested, confidentiality of workers and whistleblowers.

From the time Billie Garde first began assisting CASE in 1983 (in response to an urgent call from me for help for a worker at Comanche Peak who needed legal advice immediately regarding whether or not he had to reveal to Texas Utilities the location of some specific safety concerns), Ms. Garde has demonstrated time and time again her deep concern for the workers/whistleblowers and at the same time her commitment to getting out the facts about Comanche Peak. CASE never considered it to be a conflict of interest for Ms. Garde to both represent workers in DOL cases and represent CASE in the licensing proceedings, since we did not believe that it was incompatible to try to protect the rights of workers and at the same time bring out the truth about safety concerns at the plant. CASE early on made the decision that we did not have the capability to, and would not, represent workers in any DOL cases, and we have not done so.

The wording (especially on page 3) of the January 2, 1987, Macktal DOL settlement agreement is very disturbing to CASE and to me, and I certainly would never have even considered signing such a document. It is important to again note, however, that I was not aware of that settlement agreement at the time, I was not asked to sign that agreement, and neither Mr. Roisman nor Ms. Garde was authorized to sign nor did they sign on behalf of CASE. In addition, although there is some very troublesome and disturbing wording regarding what Mr. Roisman and Ms. Garde agreed not to do, CASE was not prohibited from seeking a subpoena for Mr. Macktal from the Licensing Board. Nor was Mr. Macktal prohibited from taking any concerns he might have to the

NRC Staff (and indeed, as previously discussed, he had already done so). I had no reason to believe that Mr. Macktal had not presented all of his concerns to the NRC staff; I have never been able to understand how some whistleblowers believe that they can complain that the NRC has not adequately addressed their concerns if the whistleblower has not informed the NRC what those concerns are.

I have no knowledge of the very serious accusations made by Mr. Macktal against Ms. Garde and Mr. Roisman in his affidavits of September 9, 1988, and December 27, 1988; however, I believe that these charges must be addressed and the opportunity afforded for Ms. Garde and Mr. Roisman to respond fully and completely to them. I am not willing to rush to judgment based on only the partial and incomplete information provided by Mr. Macktal, and I again urge this subcommittee to assure that Ms. Garde and Mr. Roisman can respond to these very serious charges which have been leveled by Mr. Macktal and his attorneys and, in effect, now by this subcommittee also if it accepts only Mr. Macktal's and his attorneys' representations without allowing complete responses by Ms. Garde and Mr. Roisman. In the interest of justice, fair play, and a complete, accurate record on which to base any decisions, this subcommittee has the responsibility to assure that Ms. Garde and Mr. Roisman are not prohibited from being able to defend themselves or to bring the complete facts to this subcommittee without the threat of being sued by Mr. Macktal. Should Mr. Macktal and his attorneys continue to make these serious charges while at the same time effectively muzzling Ms. Garde and Mr. Roisman, CASE believes that this subcommittee should (at a minimum) make an adverse inference from this, since it clearly raises questions about

whether or not Mr. Macktal and his attorneys really want tne truth to come out. Because these questions have been raised in the context of these hearings, the subcommittee has a responsibility to the public to assure that the truth does come out, and we trust that it will do so /3/.

After Mr. Macktal's DOL settlement, Ms. Garde assured me that all of the documents from his DOL case which we might want to use in the operating license proceedings were in the pubic record, and sometime after that Ms. Garde sent those documents to me. (Although I have not been able to locate them in the short time since I found out that I was to be subpoenaed for these proceedings, and am therefore unable to list them here, Ms. Garde indicated that they were all in the public record, and it is my understanding that the subcommittee does not require those documents to be provided.)

I had heard nothing from Mr. Macktal for some time when I was telephoned by him, according to my records, on August 3, 1988. I wrote down his address and telephone number and agreed to send him some recent clippings, etc.; see Attachment 2 hereto. One of the comments he made to me during that discussion struck me as so peculiar that I noted it: "He also said he had read about the OL [operating license] settlement in the papers & that it looked like he should have waited to settle his DOL case." I was a bit taken back by his comment and responded, to the best of my recollection,

/3/ Although we are concerned at the possible damage which might be done to innocent people because of some of the public statements which have already been made, CASE believes that this subcommittee is indeed interested in the truth and that that is the underlying reason for this hearing to begin with.

something like, "No, I don't think so." I don't recall having spoken to him since that time, and it was shortly after that that newspaper articles appeared with charges of money for silence.

The below-listed documents (which are attached hereto) are other relevant documents in my possession which I have been able to locate which the subcommittee has requested (other than documents in the public record); if I identify and locate others, I will provide them to the subcommittee under separate cover /4/:

Attachment 3 -- August 10, 1988, letter from Anthony Z. Roisman to editor, Legal Times, regarding story on settlement involving Comanche Peak nuclear plant, with attachments:

July 20, 1988, letter from Michael D. Kohn to TU attorney Robert Woolridge (sic)

7/11/88 telegram from S. Hasan (S. Kohn) to Anthony Roisman, settlement demand

July 12, 1988, Notice of Withdrawal by Michael D. Kohn, Stephen M. Kohn, and David K. Colapinto as attorneys of record for Citizens for Fair Utility Regulation (CFUR), the Greater Fort Worth Sierra Club, the Comanche Peak Citizens Audit (CPCA), the "individual residents" and the "second group of individual residents" in the NRC licensing proceedings

July 10, 1988, letter from Michael D. Kohn and Stephen M. Kohn to TU Attorney Jack R. Newman, Esquire, Newman and Holtzinger, settlement demand for Mr. Hasan

/4/ As I indicated to Mr. Berkovitz on the telephone, there are probably several million pages of documents in what used to be my home (my living room has no couch and only one secretarial chair, and shelving units along the walls). I currently have stacks and stacks of unfiled documents, in the living room, on the front porch, in the kitchen, all over the house. I have made a good-faith effort to comply with the document production request of the subcommittee and will continue to do so if I identify and locate additional documents. It is also my understanding that it is not necessary for me to provide documents which the subcommitte already has from other sources.

Attachment 4 -- August 25, 1988, letter from Stephen M. Kohn to Mrs. Juanita Ellis, informing that Kohn and Associates now represents Mr. Macktal and requesting that she not communicate directly with Mr. Macktal, etc., with attachments: two August 24, 1988 letters from Joseph J. Macktal to Kohn and Associates confirming representation by Kohn and Associates

Attachment 5 -- August 26, 1988, letter from Stephen M. Kohn, Michael D. Kohn, David K. Colapinto to Texas Utilities Corporation, Robert A. Woolridge (sic), Esq., Jack R. Newman, Esq., Mr. William G. Counsil, Citizens Association for Sound Energy (CASE), CASE Board, Government Accountability Project (GAP), GAP Board, Trial Lawyers for Public Justice, Anthony Z. Roisman, Esquire, Billie P. Garde, Esq., Victor Stello, Stone & Webster Corporation, Brown & Root Corporation, Nuclear Regulatory Commission, Louis Clark, Esq., c/o Robert A. Woodridge (sic), Esq., requesting $750,000 for Messrs. Hasan and Macktal from the "5.5 million dollar whistleblower fund for whistleblowers at Comanche Peak"

Attachment 6 -- September 1, 1988, letter from Arthur H. Bryant, Executive Director, Trial Lawyers for Public Justice, to Stephen M. Kohn, Michael D. Kohn, David K. Colapinto, responding to their August 26, 1988 letter

Attachment 7 -- September 3, 1988, letter from Mrs. Juanita Ellis, President, CASE, to Stephen M. Kohn, Michael D. Kohn, David K. Colapinto, responding to their August 25, 1988 letter

Attachment 8 -- September 11, 1988, letter from David L. Kern, CASE attorney, to Stephen M. Kohn, responding to his letters of August 25, 1988, and August 26, 1988

Attachment 9 -- September 14, 1988, letter from Tony Roisman to Stephen M. Kohn and Michael D. Kohn, responding to their recent oral and written pronouncements

The CASE/TU Settlement Agreement

The subcommittee has indicated that it would also like for me to briefly address the question of whether or not the $4.5 million CASE/TU settlement was in any way "hush money" or money for silence. The answer is

emphatically no. At the July 13, 1988, final prehearing conference before the Atomic Safety and Licensing Board of the Nuclear Regulatory Commission, Mr. Roisman articulated very eloquently some of the reasons for CASE's settlement (transcript pages 25249 et seq.). Since he will not be at the hearing to testify, I am excerpting below portions of his statement to explain to you some of the reasons for CASE's decision to settle:

> ". . . This is not an agreement, as Mr. Edgar has said for Texas Utilities, to resolve any substantive issue.
>
> "Every issue that CASE believed was of concern a month ago, it still believes is a concern today. Every conviction that it had a month ago to see to it that those concerns were adequately addressed before CASE would be satisfied, if it would be satisfied about the safety of this plant, remains today.
>
> "What CASE has done is to exchange a process that it was using to pursue those for a far better and more effective process.
>
> "All of you who today came here to present your views to this Board have seen in a small microcosm what's wrong with the legal system for resolving these issues.
>
> "Each of you have in one way or another been frustrated by the legalisms of the Nuclear Regulatory Commission licensing process, the rules, the regulations, the decisions of the Commission and its licensing boards which have bound this Board and bound all of us as parties.
>
> "We have spent today and in preparation for today hours, and you many hours, doing nothing but dealing with legalisms. What CASE has decided is that at this moment in time, what is needed is less time with lawyers arguing with lawyers about the law and more time with technical experts talking to technical experts about substantive issues of safety and concern.
>
> "We have reached a plateau from which CASE believes that it cannot progress adequately in the legal process. It has done what virtually every other person in the world does all the time. We don't resort to litigation as our first resort for dealing with problems.
>
> "Ten years of beating up on, of contesting, of challenging, of confronting the Texas Utility Company has brought them to a

position in which CASE is convinced that we can make more progress, do more for public health and safety, assure a better quality plant, or if it cannot meet the quality required, assure that it will not be licensed, through a process other than the legalisms which all of you ran into today.

"Never again will CASE have to worry about 10 CFR, which those of you who have had the misfortune to study, will realize is not a model for rational decision-making.

"It is a process; it is a legal process. It's a process that applauds lawyers like myself, but not technical experts like Jack Doyle, not technical experts like Chuck Atchison, not technical experts of the kind who the intervenors would like to have present their views to this Board.

"No one knows that better than the two technical members who sit on this [Licensing] Board and must see the conflict. So CASE has made a very studied and careful decision.

"A second thing that CASE has done is it has bargained for and obtained a substantial yearly resource from Texas Utilities to allow it to hire the consultants to present its views to Texas Utilities; in effect, to be a pure and true independent ombudsman of this corporation.

"Now, no one knows better than Betty Brink and CFUR what those resources mean because they withdrew from this hearing seven years ago because they didn't have the resources to proceed.

"Resources and expertise is what this is all about. That's the issue, and that's what CASE has bargained for.

"In recent months Jack Doyle and Juanita Ellis had a chance to test the effectiveness of the meet-with-Texas Utilities-and-try-to resolve-the-substantive issues.

"And in literally days and weeks of meetings and preparation, they managed to persuade Texas Utilities to do in the design of piping and pipe support what Jack Doyle and Mark Walsh had been urging this corporation to do for years.

"And they reached an agreement. In that same time frame, as one of the earlier speakers pointed out, in that same time frame this licensing board was unable to prevent the alleged harassment of Cygna investigators hired by the company at the urging of the Board, or to prevent the existence of whistle blowers who felt that their concerns were not being adequately addressed within the plant.

"CASE's response to that is: Let's get away from this board that sits on a platform and get down into the inside of Texas Utilities where the decisions are being made, where you can really have an impact the way Juanita and Jack Doyle did on the piping and pipe support question.

"Now, that exchange -- the exchange of this abstract and remote licensing process for the day-to-day processes which puts Juanita in a position and CASE in a position to really influence day-to-day decisions, not to deal with history but to deal with current events. That's what CASE has bargained for.

"Secondly, CASE has retained the avenues to pursue the problems to the extent that it and the company don't come to agreement. It pursues all of its rights in front of the NRC Staff. It pursues the rights hidden in that 10 CFR known as 2.206, the right to petition the agency to take action, including the right to shut down construction at the plant, the right to seek any kind of order that would restrict what the company can do at the plant. Those rights are preserved.

"The right to talk to the press, to get these cameras out at any time, for Juanita to walk out of a meeting of the operations review committee and hold a press conference and say, 'Let me tell you what happened in that meeting, and what they didn't agree to and why I think they were wrong.'

"All those rights are preserved, every single one of them. Plus the rights of any other person who thinks that this licensing process is the better way to go, to come to the Commission and ask the Commision, 'Start one for us.'

"And as this Board has already ruled today, as everyone has agreed, there is no difference in the rights of a party who filed a petition yesterday and one who files one tomorrow. The rights are exactly the same.

"They face the same hurdles. They must go through the same legalisms. They stand in the same shoes.

"And if they are able to prevail and they have an opportunity to be in front of the licensing board, maybe ten years down the road, they, too, will learn what CASE has learned; that is, that there can be and is a better way.

"The parties who spoke out today, CASE is delighted at this show of public concern about nuclear safety and this plant. It is sorry that it wasn't there earlier. It is sorry that it wasn't there to help the process as much. It hopes that this is indicative of the fact that this will not be one woman and her

board and her members pursuing this issue on behalf of all of the State of Texas or the nation, as one speaker indicated, but rather that this is the beginning of an outpouring of interest sufficient to work with the most effective citizen intervenor group in the nation, to see to it that Texas Utilities builds a plant that is safe.

"Let me say something on this. There is not a single person at Texas Utilities who I have ever met, and many who I have cross-examined, who has ever indicated to me or demonstrated to me that this company has an interest in building an unsafe plant.

"There's a genuine disagreement as to what that safety requires. There's nobody there, they have nothing to gain, and if you thought they did, take a look at what has happened to general public utilities (sic) who built and operated an unsafe plant and have essentially gone into bankruptcy as a result of it. That's the Three Mile Island plant, of course.

"There's no interest, there's no self-serving interest in this company building that plant. What CASE has done for ten years is to say, by banging on the door, 'We have something to offer you that will help you make this plant safe.' And what Texas Utilities has said in this agreement, 'You know what? You do, and we want to open our door and bring you in so that we can hear you better without the noise factor of the litigation process.'

"Now, Juanita, Billie Garde and myself have spent literally hours each day, and every day since this agreement was made public on July 1, talking to citizen groups, many of whose spokespersons were up here today, to explain to them not only the Joint Stipulation, but the broad outline of the settlement agreement, to assure them beyond any doubt, as everyone here will know in a few minutes if the Board approves this dismissal, and the settlement agreement is released, that no one -- no one -- is prohibited from speaking out.

"No worker is prohibited from raising his concerns in any form that he seeks. The only thing the workers are being asked to release is their liability claims against the company for their allegation that they were wrongfully discharged.

"We've read the relevant portion of the proposal that has gone to each of those workers to anybody who would listen to it. And it says it in crystal clear language.

"All the concerns that were raised this morning, that allegedly the great secrets that were not released, Juanita, Billie and myself have explained at great length -- at great length -- to

allay the fears of the public and any person that there is no silence associated with this agreement and that there is no gag order placed on anyone.

"Nor would anyone have been willing to sign such an agreement.

"What Juanita Ellis has done -- and I must say to me it's a stunner -- ten years of fighting this plant has produced what we have heard in some forums -- not here today -- the suggestion that she's selling out by agreeing to spend five more years being involved with this plant.

"Even for a woman as young as Juanita, 15 years of her life devoted to a single project is a substantial piece of time.

"There has been in the press and some innuendo in the pleadings before this Board that silence and money were being exchanged. Not only is that a gross misrepresentation of what is clear in the document itself, clear in the statements that Juanita and Billie and I have made, clear in what anybody -- I mean those of you who know some of these whistle blowers who have ever seen Chuck Atchison or Dobie Hatley or any of the people who are involved as whistle blowers at this plant, silence is the last thing on their mind, is the last thing that they would ever bargain for.

"These are the most articulate people you will ever meet. They are not silent. . .

"Lastly, I want to talk about the question of trust. The team of people that have been involved with CASE in this licensing proceeding is (and I will say somewhat immodestly and include myself in the group) the absolute best in this country on interventions and representation of citizen groups.

"Juanita Ellis -- and I've worked with them all; I've worked with virtually every citizen group that's involved in nuclear plants. I've never in my life seen a person as effective in the legal process, in the administrative process, in what she writes and how she does it and as dedicated as Juanita Ellis or CASE as an intervenor. None. None with that staying power. None with that capability.

"There is no lawyer in this country that even is in the same page of the book as Billie Garde as a person who works with whistle blowers, who understands their concerns, who helps them present those concerns effectively.

"While I will not say that I am the number one intervenor lawyer, I can at least say that I've been around longer than any of the other intervenor lawyers, and I've been in a lot of these cases. . .

"All of you know of the quality of this Licensing Board.

"Trust means taking the word of those who know. This Board has already said that this agreement is good and appropriate and should be approved.

"Billie, Juanita and I don't really think it's good. We're enthusiastic. We're jumping up and down. We're ecstatic. We know that this is the best possible way for CASE to proceed to pursue the issues that it wants to pursue.

"Mark Twain said something once that I think is important to reiterate here. He said, 'The truth hasn't got its boots on by the time a lie is halfway around the world.'

"We're today trying to tell you the truth about what this is all about, and we do not accept the premise that because we suddenly come to a point in the process where we believe we can work better inside than outside, that there's a basis to believe that that is an unfair settlement.

"Remember the role of the whistle blowers in all of these cases. They start on the inside, and when they come out it's to get the right to go back inside again, because they know better than all the rest of us that the decisions are made on the inside, not here by the Licensing Board, certainly not by the lawyers.

"This settlement agreement is enthusiastically supported by all but perhaps one of these whistle blowers, because they know better than any of the rest of us that what has been bargained for and obtained is the right to make a difference.

"I, for one, am not willing to accept the premise that a corporation is unable to see the light, and that's the premise of this whole discussion.

"I think Texas Utilities as a company has come a long way and I think that CASE is prepared to recognize that movement and say, 'Let's work together. If this plant can be made safe, we will work together to see that that happens.'

"Trust is a two-way street and what CASE has been saying in every way that it could and in every forum available to it is, 'You have every reason to trust the judgment of the people who know this licensing process better than anybody else; that this settlement and this agreement are not only in the public interest but substantially advance the public interest.'"

TU attorney Mr. Edgar summarized the terms of the CASE/TU settlement agreement in the record of the July 13, 1988, prehearing conference (transcript pages 25266-25270).

I call the subcommittee's attention to transcript page 25268, where Mr. Edgar states:

> "Although any former worker who agrees to settle his claim will be required to execute a general release, the release does not preclude him from bringing any safety or technical matter to the attention of the NRC."
>
> "[Licensing Board Chairman] Judge Bloch: That's the point Mr. Roisman was addressing before. There is no restriction at all on anyone coming to the NRC with safety concerns."
>
> "Mr. Edgar: Right, and might I add another point just for the record, that many of the provisions that I'm summarizing here are repetitive or redundant to those in the Joint Stipulation and in that regard the Joint Stipulation indicates clearly that nothing in that stipulation would in any way limit the right of any individual or CASE to go to the NRC."

Thus, in the record of the licensing proceedings, there was a very clear, very solemn, and very definite commitment made to the Licensing Board and to the public that in the CASE/TU settlement agreement there is no restriction at all on anyone coming to the NRC with safety concerns. What could be clearer than that?

Aside from any other considerations such as ethics, accuracy, and a desire to tell the truth, I do not believe that TU Electric is dumb enough to have deliberately lied in the public record about this matter to the Atomic Safety and Licensing Board. Does this subcommittee really believe that? Although I myself have not personally seen the wording of all the settlement agreements (since they are confidential) of those individuals who have benefitted from the $5.5 million workers fund which flowed indirectly

from the CASE/TU settlement, certainly it was always my understanding and belief that there was no restriction in them on anyone coming to the NRC with safety concerns. Certainly that was always the intent and agreement between CASE and TU. I feel sure that this subcommittee will ascertain for itself whether or not this is, in fact, the case -- and we hope that you do, and that you and the news media report your findings with as much attention and excitement as were reported the erroneous charges of impropriety.

We also call the attention of the subcommittee to all of the statements of Licensing Board Chairman Judge Bloch, but especially at transcript page 25286-25287:

> ". . . and it's because of the integrity of the recent Staff efforts that I have great confidence that this agreement will be overseen by a vigorous staff. .
>
> "It's also a confidence that Texas Utility will continue with a high level of technical concern and my conviction that CASE will continue with its high level of technical concern and diligence that I'm convinced that we have a procedure here that is far more effective than the continuation of these proceedings could ever be to assure the safety of this plant, which is the bottom line under the law.
>
> "It's the bottom line of our responsibility for the Nuclear Regulatory Commission. . .
>
> "I would like to say in passing, Mr. Roisman, I am really pleased that we have a better procedure than the Atomic Safety and Licensing Board now, but there was a time in this case where that was not true. It required the cauldron of dispute, the bitterness that was reflected in the hearings and the disagreements before the parties were able to reach the situation that we've reached now."

If there is still the slightest doubt as to whether or not the CASE/TU settlement in any way involved money for silence, let me assure this subcommittee and the public that CASE and I have not "sold out" or been

"bought off." I don't know about you, but when I think of someone "selling out", I think of someone taking the money and running. One does not "sell out" by signing up to continue to monitor the plant for the next five years or so, as we have done. One does not "sell out" by continuing to work 10, 12, 14, 16 hours a day to assure that Comanche Peak is as safe as possible, as we have done and are doing now. One does not "sell out" by having CASE consultants attending NRC exit meetings, accompanying TU's QA auditors performing audits, reviewing and analyzing tens of thousands of pages of documents, and going on walkdowns of plant systems at two or three o'clock in the morning, as CASE consultants have been and are doing. One does not "sell out" by having Billie Garde hold over twenty two-hour sessions (sometimes morning, afternoon, and night) with mid-level managers at Comanche Peak to provide them with information on additional methods for dealing with worker concerns, which she has recently done. One does not "sell out" by participating fully as a member of the Comanche Peak Operations Review Committee (ORC), as CASE is and will continue for at least five years.

To the contrary, CASE is still hard at work, as diligently as ever, in monitoring Comanche Peak -- not because of, but in spite of, increased and numerous other demands on our time and resources such as these hearings.

I have also been asked to address some of the reasons for CASE's decision to settle with TU and discontinue as an intervenor in the operating license proceedings. I welcome this opportunity.

One of the primary reasons for CASE's decision to settle was my personal decision that I was physically unable (primarily because of my continuing and chronic back problems which had developed in late 1984) to continue with the licensing hearings process; I had known for some time that I would be unable to continue in hearings once they began again. For some time, at my request, licensing prehearing conferences, most NRC public meetings (all of those which I attended), and most CASE/TU meetings (all of those which I attended) had been held in Dallas to make it possible for me to attend -- and if it wasn't held in Dallas, I didn't go. However, I am still able to do work from my home (doing a minimum of local travel only, attending only a few meetings occasionally, certainly nothing like the continuous grind of driving to and from, and sitting or sometimes standing all day in hearings). The CASE Board of Directors believed that there was no one else with CASE who wanted to continue who had the background, expertise, time, and experience to step in at this point in time and continue. The CASE Board also considered the possibility of some other organization continuing in the hearings on behalf of CASE, and it was decided that CASE did not want to in effect turn itself over to any other organization; in addition, the Board did not know of anyone else who wanted to continue who had the expertise, time, and experience to continue and do the same caliber of work which CASE had done in the past. And even had there been such an organization, CASE did not have sufficient funds to do the job that needed to be done to continue in hearings.

A constant problem for CASE (as I'm sure it is with most intervenor groups) has always been raising sufficient funds to continue. At the time

when hearings were about to begin again, CASE simply had been unable to raise sufficient funds to do what we needed to do to a credible and effective job in hearings.

Even disregarding those considerations, however, there were other compelling reasons for the decision CASE made. Although there were some issues which we could and would have addressed had we remained in the hearings process, we were about to enter into a phase which would have been very difficult indeed for us.

Jack Doyle and Mark Walsh, the two former engineers at Comanche Peak who have worked with CASE since 1982 and whose work has been, and is, of such vital importance, had by that time already had several meetings with engineering personnel of TU and its consultants, and had stated publicly that TU's plan for resolving the piping/pipe supports issues appeared to be a good plan, although they were not yet ready to concede that the implementation of that plan would be adequate. And generally TU's plans for addressing other issues appeared to be good plans, although we were not yet ready to concede that the implementation of those plans would be adequate.

This left CASE in the position of going into hearings soon with our own expert witnesses testifying that TU's plans looked good. Certainly CASE was not going to complain that TU had listened to us, addressed our concerns, and now proposed to conduct their reinspection/reanalyses/redesign in the manner CASE had said they should conduct it. We were getting the reinspection we had called for in 1983 in our Proposed Findings of Fact and Conclusions of Law (Walsh/Doyle Allegations). TU is now in the process of reperforming their Hot Functional Test; CASE had attempted to have the

Licensing Board accept a new contention, I believe it was in late 1983, that TU should have to perform their Hot Functional Test over again. So we are getting what we wanted in that regard. The fact was that CASE had already been successful -- very successful, and there is no doubt in my mind that Comanche Peak is a much safer plant because of our efforts.

Although there did exist the possibility that CASE could attempt to monitor and possibly challenge the implementation of TU's plan, the fact is that in the context of hearings, there is no really good way to monitor implementation of such a plan unless the intervenor has whistleblowers who either still work at the plant or have recently worked at the plant. At that point in time, CASE did not have the very large number of whistleblowers which we had had in the past; in fact, there were only about five of whom we were aware who had recently worked at the plant and might be able to provide information regarding TU's implementation of this most recent plan /5/. In short, we simply had no good way in the context of the hearings process to monitor the implementation of TU's latest plan, which was what needed to be done next in regard to the design and design quality assurance issues.

Another possible aspect which we might have litigated was the still-open issue of harrasment and intimidation of workers which had been on hold since the hearings were suspended in 1985. However, our position in the hearings had been that such harassment and intimidation was important

/5/ To the extent their concerns have not already been addressed, they are now in the process of being addressed and, hopefully, resolved. There was a real question in my mind at that point as to how effective

because it could have affected the design, construction, or inspection of the hardware at the plant and thereby might have affected the safety of the plant. Our position had further been that, if harassment and intimidation had indeed taken place, what had to be done once that determination was made was a reinspection of the plant. But we had already won such a reinspection with TU's latest plan.

There was a real question in my mind at that point as to how effective we could really be in the confines and constraints of the hearings process, and how much we could accomplish toward making Comanche Peak a safer plant. I could foresee the very real possibility and likelihood that, had we continued with the hearings, we might possibly have delayed the licensing of the plant but would have probably done very little to assure an additional increase in the safety of the plant. I also firmly believed that, because of TU's extensive commitment of resources and personnel and what appeared to be a sincere commitment to doing it right this time, TU would eventually obtain an operating license this time, though perhaps with some license conditions. Once that occurred, CASE would never have had the ability to monitor the implementation of TU's plan except through after-the-fact means such as reading NRC inspection reports, Freedom of Information Act (FOIA) requests, etc. There was no comparison between that prospect and the relatively free flow of information we had been receiving for some time from TU.

So, aside from any other considerations, looking at it strictly from the point of view of the best way open to CASE to assure that the

public health and safety would be protected and that we would be able to continue to inform the public about the manner in which Comanche Peak had been designed and constructed, in the informed opinion of those of us who knew the situation, the very broad and sweeping provisions worked out in the settlement agreement were by far the best choice available to CASE.

The $5.5 million whistleblowers fund

We especially appreciate the opportunity provided by this subcommittee hearing to set the record straight regarding the CASE/TU settlement and the $5.5 million which flowed indirectly from it to the workers. Money was the last matter considered in CASE's settlement discussions. The $5.5 million for the workers has turned out to be the most maligned, misrepresented, distorted, and misunderstood portion of the CASE/TU settlement. The unfounded, untrue, libelous, and unfair charges leveled by people who did not know what they were talking about and did not make the effort to cure their ignorance has been one of the most exasperating, disturbing, and deeply hurtful episodes of my life and of CASE's 15-year life.

For the most part, I will leave it to those who were actually involved with the funds for the workers which flowed indirectly from the CASE/TU settlement to answer questions regarding who got how much, the specific wording of the workers' settlement agreements, etc. There is one paragraph in the entire CASE/TU settlement agreement about this matter (page 3 of CASE/TU settlement agreement):

> "2.3. In recognition of CASE's concerns about workers formerly employed in connection with the construction of the CPSES, who may have employment discrimination claims against TU Electric or a contractor thereof, whether pending or anticipated, at the time of

> the signing of this Agreement, or who have assisted CASE in the CPSES licensing proceeding, TU Electric has also entered into good faith settlement negotiations which will resolve the disputes with the representatives of the former workers currently engaged in litigation if and when the Joint Stipulation becomes effective. Now and in the future, TU Electric agrees to make a good faith effort to investigate and resolve issues brought to CASE by CPSES workers or others."

That paragraph was not necessary to the CASE/TU settlement. We could have settled and taken out that paragraph and left everything else in. We didn't have to include it. It was included for one reason and one reason only: CASE and I wanted it in there. We wanted to do something good for the workers who had assisted CASE in the licensing proceeding, who had done so when we had nothing to offer them but grief, when there was no money on the table, and when they had everything to lose and nothing to gain by assisting us in trying to bring out the truth about Comanche Peak and to make Comanche Peak as safe as possible. It's as simple as that.

Although TU can and I'm sure will speak for themselves, I have to say in all fairness that in this instance, they are getting a bum rap. It was not TU's idea that that paragraph be included; it was CASE's. For their own reasons, which I will leave for them to address, TU agreed. Further, TU would have had to be awfully dumb to pay to silence individuals who had already told anybody and everybody who would listen (in most instances, including the Licensing Board!) what their concerns were.

In order to fulfill its part of the CASE/TU settlement agreement, TU had only to make a good faith effort to resolve the worker disputes. Not one worker was under any obligation to accept TU's settlement offer. Not one worker was muzzled in any way from being able to present his concerns in

any forum he/she chose. CASE, for reasons which we believed and believe were proper and valid, had merely made a decision not to continue to work in the hearings process -- a decision which only CASE was entitled to make or was qualified to make. Shortly after the settlement was announced publicly, in a telephone conversation with one of the Kohn brothers (I believe it was Mike but I really do not remember for sure at this time), he asked why we had not consulted with them [I assume he was referring to him and his brother and GAP] before deciding to settle. As I told him then, it was because it was not their decision to make -- it was CASE's decision.

The false charges which have been made about the CASE/TU settlement and the $5.5 million received by workers which indirectly resulted from that settlement have cast aspersions on the workers -- those courageous men and women who have given so much to help protect the public health and safety, at enormous and continuing personal and professional cost to themselves and their families. These brave individuals deserve better -- they do not deserve the unfair and uncaring treatment they have received at the hands of certain individuals who have their own axes to grind (for whatever reason), by some in the news media who did not take the time to do their homework and ascertain the facts, and, yes, even by this subcommittee which did not adequately investigate before apparently relying on the distorted picture painted by a few people who also did not know the facts. I mean no disrespect to the subcommittee; but I do believe that you have been seriously misled. If the subcommittee wanted to know whether or not there was money for silence associated with the $5.5 million, I find it truly amazing that it did not call as witnesses those workers who have received

the money. I have a feeling that some of those individuals, such as Chuck Atchison and Dobie Hatley, would have plenty to say about whether or not they had been paid to be silent!

CASE and I, because Comanche Peak has been my life for so many years, also deserve better treatment. I personally have been very deeply and irreparably hurt by all this. CASE and I have worked for the past fifteen years to establish our credibility; we have done it by an unbelievable amount of concentrated hard work, by documenting our facts and continually striving to bring out the truth about the Comanche Peak nuclear power plant. In so doing, we have paid our dues, and sometimes those dues have been very high indeed -- financially, physically, mentally, and emotionally. And over the years, we earned the respect of friend and foe alike. Or so we had thought.

In retrospect, I believe that much of the outrage about the CASE/TU settlement expressed by some in the public interest community was because of what they perceived as a big secret, which some people then erroneously pounced on as being "hush money." Some wanted to know why we hadn't told other groups prior to the settlement. That is very simple. Before TU would even talk to us at all about a possible settlement, we had to agree that we would not discuss it except with specific individuals such as CASE's attorneys and Board members. If we had breached that initial confidentiality agreement, there would, quite simply, have been no settlement to talk about. In addition, TU would never have made public the

letter from TU's then-Executive Vice President, Bill Counsil, to me /6/ (and we also had to promise confidentiality about it) until and unless the Licensing hearings were in fact dismissed. Stop and think about that for a moment: It must be obvious that no utility in its right mind would have publicly made admissions like that knowing that CASE would have turned right around and used it against them in the operating license hearings had we remained an intervenor. That letter was a keystone of our settlement with TU; it was an indication to us that what we had been complaining about for nine years -- TU's attitude and mindset -- was changing, that there was hope at last that upper management of that utility was beginning to get the message we'd been trying to send all those years; it was what got me interested enough in the first place to tell the CASE Board of Directors that I believed that it was worth at least exploring the possibilities of a settlement. And with that letter as the cornerstone, CASE began the process of carefully pounding out language with TU of the unique process which would assure that CASE would have more freedom, more rights, more access, more ability to monitor, than any other intervenor I've ever heard of.

What was initially being kept secret was not anything that CASE had to be ashamed of -- to the contrary, everything that was in the CASE/TU settlement agreement that was "secret" was good for CASE and good for the public interest. Once the operating license hearings were dismissed and Mr. Counsil's letter had been admitted into evidence, there was no longer any

/6/ Accepted into evidence and read into the record of the 7/13/88 prehearing conference at Tr. 25291-25295; and included in the CASE/TU settlement agreement itself (item 2.4, pages 3 and 4; and attached as Exhibit C).

reason for secrecy, and the entire CASE/TU settlement agreement was released and made a part of the official record of the licensing proceedings; it remains there now, attached to the Licensing Board's 7/13/88 Memorandum and Order, for anyone to see and read who is interested in the truth.

We have worked very hard to establish and implement the unique process which we hammered out with TU, and I am very proud of what we have accomplished and are accomplishing. Although the process has not always been easy or simple, we have been able to work things through so that we have been effective -- TU and the NRC Staff are being responsive, and we are making a difference at a vitally important time and in vitally important ways. We have, in fact, been even more effective than I had imagined we could be, and we fully expect to continue to be effective, to make a difference, and to help assure that Comanche Peak is as safe as possible.

CASE made a very careful and studied decision not to continue in the operating license proceedings and the construction permit amendment proceedings -- based on all the facts as only those of us who had worked all those years in the licensing process could know them. We made that decision not because we were being muzzled; to the contrary, we had the unique and unprecedented opportunity to monitor Comanche Peak in a far more detailed and complete manner than we would ever have been able to do in the licensing proceedings context -- and, for a change, we would have the resources to do it without having to continually beg for help and money, without everyone involved having to mortgage the house, the kids, and the car to do it! We had a chance to really make a difference in the manner in which Comanche

Peak is being completed. It should have been a glorious and victorious day for the public interest community. There should have been cheers for what CASE had been able to achieve. I should have been able to devote even more time to helping assure the health and safety of the public.

Instead, much of the past ten months or so since the CASE/TU settlement, although it has been very productive, important, and satisfying in some ways, has in other ways been very distressing and almost a nightmare for me. I must say that (although we could not possibly have continued much longer that way) personally I was much happier when CASE was broke and constantly wondering where the money for the next hearing was going to come from.

We thank the subcommittee once again for this opportunity. I, for one, am tired of constantly having to explain and defend what CASE has achieved. Perhaps this will help to set the record straight. We have done nothing for which we should apologize; to the contrary, in my opinion, the apologies are due from elsewhere.

Respectfully submitted,

CASE (Citizens Association for Sound Energy)

Juanita Ellis

(Mrs.) Juanita Ellis
President

STATE OF TEXAS

COUNTY OF DALLAS

Comes now Juanita Ellis, the undersigned, who hereby affirms and declares that I am the President of Citizens Association for Sound Energy (CASE), whose address is 1426 S. Polk, Dallas, Texas 75224; I further affirm and declare that the preceding 36-pages entitled "Testimony of CASE President Juanita Ellis for May 4, 1989, Hearing Before Subcommittee on Nuclear Regulation of the Environment and Public Works Committee of the United States Senate" was prepared under my personal direction. I have read the statements therein, and they are true and correct to the best of my knowledge and belief.

Juanita Ellis
(Signed) Juanita Ellis

Date: May 2, 1989

STATE OF TEXAS

COUNTY OF DALLAS

On this, the 2nd day of May, 1989, personally appeared before me Juanita Ellis, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes therein expressed.

Subscribed and sworn before me on the 2nd day of May, 1989.

Lisa Smith
Notary Public in and for the
State of Texas

My Commission Expires: 11-13-92